

1998

Brent D. Mitchell v. Prime Commercial, Inc : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS**A10**

DOCKET NO.

980295

BRENT D. MITCHELL,

Plaintiff/Appellee,

VS.

PRIME COMMERCIAL, INC., a
Utah corporation,

Defendant/Appellant.

Case No. 980295-CA

Priority No. 15

BRIEF OF APPELLEE BRENT D. MITCHELL

**APPEAL FROM A SUMMARY JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE ANNE M. STIRBA, DISTRICT COURT JUDGE
CIVIL NO. 950906465 CV**

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Utah Court of Appeals
FEB 12 1999
Julia D'Alesandro
Clerk of the Court

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Utah Court of Appeals
SEP 16 1998

Julia D'Alesandro
Clerk of the Court

Case No. 980295-CA
UTAH COURT OF APPEALS
BRIEF

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Brent D. Mitchell,
Plaintiff and Appellee,
v.
Prime Commercial, Inc.,
Defendant and Appellant.

This matter is before the court on appellee's motion for summary affirmance based on insubstantial question and on appellant's motion for summary reversal based upon manifest error.

IT IS HEREBY ORDERED that the motions are each denied and a ruling on the issues raised is deferred until plenary presentation and consideration of the case. Utah R. App. P. 10(f).

Dated this 13 day of September, 1998.

FOR THE COURT:

James Z. Davis, Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on September 16, 1998, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this September 16, 1998.

By 
Deputy Clerk

Case No. 980295-CA

IN THE UTAH COURT OF APPEALS

| | | |
|---------------------------|---|--------------------|
| BRENT D. MITCHELL, |) | |
| |) | Case No. 980295-CA |
| Plaintiff/Appellee, |) | |
| |) | |
| vs. |) | |
| |) | Priority No. 15 |
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| |) | |
| Defendant/Appellant. |) | |

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Section 78-2a-3(j) of the Utah Code Annotated (1953, as amended).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Appellant and Defendant Prime Commercial ("Prime") waived its right to appeal this matter by stipulating to judgment resolving all claims between the parties (R. 924-25; 926-28).

A judgment given pursuant to a stipulation of the parties is presumed to be correct in the absence of a showing to the contrary. Payton v. Magleby, 516 P.2d 344, 345 (Utah 1973).

2. Whether the trial court correctly determined, in granting summary judgment to Plaintiff Brent D. Mitchell ("Mitchell"), that Defendant Prime Commercial ("Prime") was not entitled to a portion of the proceeds of the sale of an interest in a development partnership owned by a limited liability company controlled by Mitchell, where such development was expressly excluded from the terms of Mitchell's Agreement with Prime pursuant to Paragraph 4 of the contract (R. 235-36, 907-09; 955 at pp. 3-16).

"Determining whether a contract is ambiguous presents a threshold question of law, which [is] review[ed] for correctness. If a contract is unambiguous, a trial court may interpret the contract as a matter of law, and [the appellate court] review['s] the court's

interpretation for correctness." Interwest Const. v. Palmer, 923 P.2d 1350, 1358 (Utah 1996) (citations omitted).

3. Whether the trial court correctly determined that Paragraph 18 of the Agreement between Mitchell and Prime was unenforceable as a matter of law (R. 237-40, 909-11, 955 at pp. 3-16).

A trial court's interpretation of an unambiguous contract is reviewed for correctness. Interwest, 923 P.2d at 1358.

DETERMINATIVE STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The determinative statutes, rules and constitutional provisions are set forth in the addendum where not set forth fully in the body of this brief.

STATEMENT OF THE CASE

This case arises from the trial court's order granting Mitchell's Motion for Partial Summary Judgment against Prime on its counterclaim against Mitchell for breach of contract. (R. 929-37). After the trial court ruled at the hearing on Mitchell's Motion for Partial Summary Judgment and dismissed Prime's counterclaim, the parties entered into a Stipulation on May 29, 1998 wherein Prime stipulated to judgment against it on all claims (R. 1-11; 924-25). Prime did not reserve any right to appeal the trial court's entry of partial summary judgment on Prime's Counterclaim in the Stipulation signed by Prime (R. 924-25). Thereafter, the trial court entered its Order and Judgment on June 3, 1998 which was approved as to form by Prime's counsel (R. 926-27). The Order and Judgment likewise did

not reserve any right to appeal from the stipulated judgment (R. 926-27). Two days later, the trial court entered its Order on Summary Judgment, to which order Prime did not object. After entry of the final Order and Judgment, Prime then filed its Notice of Appeal seeking to appeal the trial court's dismissal of Prime's Counterclaim (R. 943-45).

STATEMENT OF THE FACTS

On January 1, 1994, Appellee Brent D. Mitchell ("Mitchell") and Appellant Prime Commercial, Inc. ("Prime") entered into an Independent Contractor Agreement ("Agreement") whereby Mitchell agreed to perform services as a real estate agent for Prime as an independent contractor (R. 5-11; Add. Exh. A). Pursuant to the express terms of the Agreement, Mitchell's duties with respect to Prime were specifically limited to the following: "to solicit and obtain listings and sales, leases, representation agreements or management contract [sic] of property." (R. 6) In fact, the Agreement expressly stated that "Agent agrees to perform no other activities in association with Broker" except for those listed above." (R. 6; Add. Exh. A).

Mitchell's employment with Prime was terminated on or about August 31, 1994 (R. 933). At the time Mitchell ceased working for Prime, Prime owed Mitchell the sum of \$20,544.69 in earned but unpaid commissions (R. 2, 924). When Prime failed and refused to pay the commissions owing to Mitchell, Mitchell filed his Complaint.

Meanwhile, during the same time period in which Mitchell was working as an independent contractor for Prime, Mitchell became a member of Red Point Equities, L.L.C.

("Red Point"), which was organized for the purpose of engaging in real estate development, not sales or marketing (R. 931). In the course of Red Point's business dealings, Red Point's interest in a joint venture to develop certain real property was purchased by one Leonard K.M. Fong ("Fong") for the sum of \$15,000.00 pursuant to a stipulated settlement of litigation between Fong and Red Point (R. 298-99). At the time of Fong's purchase of the partnership interest, the joint venture had not entered into any listing agreement with Prime for the listing or sale of any of the finished units because no development or construction had commenced. (R. 931-33).

After Mitchell commenced this action by filing his Complaint, Prime filed a Counterclaim alleging that Prime was entitled to (i) a portion of the commissions Mitchell earned as an agent for Proactive Properties ("Proactive"), Mitchell's new broker; as well as (ii) a portion of the sum paid by Fong to purchase Red Point's interest in the joint venture (R. 36). Prime claimed it was entitled to a portion of the commissions Mitchell earned as an agent with Proactive pursuant to Paragraph 18 of the Agreement, which states:

Agent shall not, after the termination of this Agreement, use to Agent's own advantage, or to the advantage of any other person or corporation, any information or materials gained for or from the files or business of Broker.

(R. 36). Prime interpreted this language to mean that Prime was entitled to a portion of any commissions Mitchell earned after termination of his employment with Prime since Mitchell necessarily learned everything he knew about the real estate industry through his

employment with Prime (R. 36, 837). Further, Prime claimed entitlement to commissions earned by Mitchell in transactions with any former Prime clients. (R. 36, 837).

With respect to the Fong partnership payment to Red Point, Prime claimed that it was entitled to a portion of the Fong partnership payment because Mitchell agreed, by virtue of the employment Agreement, to "do 'all employment in connection with the real estate business' through Prime" (R. 829). Thus, according to Prime, Mitchell's participation in a real estate development company was allegedly on behalf of Prime, despite the express language of Paragraph 4 of the employment Agreement to the contrary (R. 829).

During the course of the proceedings before the trial court, Mitchell filed a Motion for Partial Summary Judgment on both claims contained in Prime's Counterclaim asserting that (i) under the express terms of the Agreement, Prime was not entitled to a portion of the Fong payment; and (ii) as a matter of law, Paragraph 18 of the Agreement constitutes an unenforceable covenant not to compete (R. 228-41). Prime opposed Mitchell's motion alleging that genuine issues of material fact existed with respect to whether development activities were covered by the Agreement and whether Mitchell used information gained through employment with Prime after termination of his employment (R. 822-33).

After a hearing on the matter, the trial court ruled, as a matter of law,

4. Because the Agreement has no facial ambiguity and does not cover development activities, and because there was no amendment to the Agreement providing otherwise, Prime Commercial is not entitled to participate in any consideration to Red Point (even if construed to be for the benefit of Mitchell) for profits or an interest in a development joint venture with Fong.

5. Because the Agreement, specifically Paragraph 18, contains no facial ambiguity, and because the use of any information or materials gained by Mitchell from Prime Commercial would prohibit any competition by Mitchell, such restriction is unenforceable as a matter of law.

6. Because Paragraph 18 is not ambiguous and because the contract is an integrated contract, the Defendant is not entitled to rely upon parol evidence, including but not limited to alleged industry standards of additional terms imposed upon agents after their termination with a brokers. [sic]

7. There is no reference in Paragraph 18 to either a restriction in time or geographic area for the use of such information and Paragraph 18 is, therefore, unenforceable.

(R. 935-36; Add. Exh. 3). After entry of the final Order and Judgment and the Order of Summary Judgment that Prime filed this appeal.

SUMMARY OF THE ARGUMENT

Three issues are presented in this brief: (i) whether Prime waived its right to appeal by entering into the Stipulation for entry of a final judgment (ii) whether the trial court correctly determined that Prime was not entitled as a matter of law to any portion of the proceeds of the Fong settlement; and (iii) whether the trial court correctly ruled that Paragraph 18 of the Agreement constitutes an unenforceable covenant not to compete. On the first issue presented, Utah law is clear with respect to waivers of appellate review. Stipulated judgments, or consent judgments are not subject to review on appeal. Accordingly, this Court has no jurisdiction over the instant appeal and there is no need for further consideration of the remaining issues on appeal.

With respect to the second issue, the trial court correctly determined that the activities covered by the Agreement did not include real estate development pursuant to Paragraph 4

of the Agreement. Giving effect to all parts of the Agreement as a whole, Prime's interpretation of Paragraph 11 of the Agreement — to which Prime bases its entitlement to payment from the Fong proceeds — is unreasonable and untenable. Prime's position is insufficient to create a question of fact with respect to the meaning of the language contained in Paragraphs 4 and 11. The trial court correctly determined that the Agreement was unambiguous and that as a matter of law, Prime was not entitled to a portion of the proceeds of the Fong settlement since real estate development was not covered by the Agreement.

Concerning the third issue on appeal, the trial court correctly determined that Paragraph 18 of the Agreement constitutes an unenforceable covenant not to compete for a number of reasons. The plain and unambiguous language of Paragraph 18 restricted Mitchell from engaging in a common calling once he ceased working with Prime Commercial. Prime failed to present evidence before the trial court to suggest that Paragraph 18 was necessary to protect the business of Prime. Paragraph 18 fails to contain reasonable restrictions as to time or geographical scope. Furthermore, enforcement as sought by Prime would violate Utah law. The plain and unambiguous language of Paragraph 18 constitutes an unenforceable covenant not to compete, as the trial court correctly found.

ARGUMENT

POINT ONE

PRIME WAIVED ITS RIGHT TO APPEAL THE TRIAL COURT'S JUDGMENT BY ENTERING INTO A STIPULATION FOR JUDGMENT WITHOUT EXPRESSLY RESERVING ANY RIGHT TO APPEAL.

After the Court's ruling on Summary Judgment but prior to entry of the trial court's Order of Summary Judgment (R. 929-37), Prime entered into a Stipulation agreeing that Judgment be entered against Prime and in favor of Mitchell in the amount of \$52,828.38 plus interest and attorney's fees (R. 924-25). That Stipulation was signed by counsel for Prime (R. 925). Nowhere in the Stipulation did Prime reserve the right to appeal either the summary judgment previously rendered by the trial court or the final Order and Judgment which was entered by the trial court upon consideration of the Stipulation itself. Moreover, counsel for Prime signed the final Order and Judgment evidencing his approval as to form without reserving whatsoever any right to appeal. (R. 926-27). In its own brief, Prime conceded that it stipulated to a final judgment "resolving all claims." (Brief of Appellant at 2). By failing to expressly reserve any right to appeal, Prime waived its right to appeal the issues raised in its Brief of Appellant when it entered into the Stipulation and approved the Order and Judgment.

Utah law is clear. "The Utah Rules of Appellate Procedure provide that appeal may be taken from a final judgment, but they do not contemplate appeal from a consent decree." Dalton v. Herold, 934 P.2d 649, 650 (Utah 1997); U.R.App.P. 3(a) (1996). Moreover, "[a]

judgment by consent or stipulation is generally construed as an agreement between the parties under which the terms of the judgment are not subject to review on appeal." Estate of Anderson, 671 P.2d 165, 168 (Utah 1983) (citing Snyder v. Tompkins, 20 Wash.App. 167, 579 P.2d 994 (1978); Pacific National Bank of Washington v. Mount, 97 Idaho 887, 556 P.2d 70 (1976); Washington Asphalt Co. V. Harold Kaeser Co., 51 Wash.2d 89, 316 P.2d 126 (1957)).

In the instant case, the final Order and Judgment was entered based upon the Stipulation between the parties (R. 926-27). Where Prime failed to reserve the right to appeal any portion of the Order and Judgment, the judgment is presumed correct and Prime has waived its right to appeal. Thus, this Court should summarily affirm the trial court's Order and Judgment without reference to any of the claims raised in Prime's appeal.

POINT TWO

THE TRIAL COURT CORRECTLY RULED THAT PRIME WAS NOT ENTITLED TO A PORTION OF THE PROCEEDS OF THE SALE OF MITCHELL'S INTEREST IN A DEVELOPMENT PARTNERSHIP.

In Prime's Counterclaim, Prime sought to obtain a commission from Mitchell's sale of his ownership interest in a real estate development joint venture contrary to the plain and unambiguous language of Paragraph 4 of the Agreement between Prime and Mitchell. The trial court correctly ruled, as a matter of law, that the plain and unambiguous terms of the

Agreement precluded recovery by Prime. Accordingly, the trial court's order of partial summary judgment should be upheld.

A. The trial court correctly gave effect to all of the parts of the Agreement in determining whether the Agreement was ambiguous.

It is a basic rule of contract interpretation that "[e]ach contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none." Plateau Min. Co. V. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990); Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061-61 (Utah 1981); Sears v. Riemersma, 655 P.2d 1105, 1107-08 (Utah 1982). While this Court, in recent years, has indicated that a trial court should "consider the writing in light of the surrounding circumstances," Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995), this Court has also made clear that "a contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does." R & R Energies v. Mother Earth Industries, Inc., 936, P.2d 1068, 1074 (Utah 1997). "To demonstrate ambiguity, the contrary positions of the parties must each be tenable. Id.; Plateau Min. Co., 802 P.2d at 725.

Prime's obvious strategy all along has been to create an ambiguity within the contract by offering an interpretation of the contract and repeatedly suggesting that such interpretation is reasonable — as if simply calling the interpretation reasonable over and over again makes it so. However, upon examination, Prime's interpretation of Paragraph 11 runs afoul of Utah Law, is not consistent with the remainder of the Agreement, and

ignores fundamental legal principles. Therefore, Prime's interpretation is untenable, is unreasonable, and fails to create an ambiguity in the document. Since the Agreement is not ambiguous, the trial court was correct in interpreting it as a matter of law.

B. Prime's interpretation of Paragraph 11 of the Agreement is inconsistent with the purpose and plain language of the remainder of the Agreement, and therefore, is untenable and unreasonable.

Prime contends that since Mitchell was required, pursuant to Paragraph 11 of the Agreement, to take "all employment in connection with the real estate business" in Prime's name, and since real estate development is "employment in connection with the real estate business" (at least according to Prime and their "expert"), Prime was entitled to share in the funds Mitchell received for the sale of Red Point's interest in the Fong joint venture (Brief of Appellant at 13). Not only is this position contrary to the plain language of the Agreement, it is contrary to the purpose of the Agreement and Utah law.

1. Prime's interpretation of Paragraph 11 is contrary to the plain language of Paragraph 4 of the Agreement.

Paragraph 4 of the Agreement states:

Until termination of this Agreement, Agent agrees to work diligently and use Agent's best efforts to sell, lease or rent any and all real estate listed with Broker, to solicit additional listings and customers for Broker and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this Agreement may derive the greatest profit possible, provided that nothing in this Agreement shall be construed to require Agent to handle or solicit particular listings or authorize Broker to direct or require that Agent do so. Agent agrees to perform no other activities in association with Broker, except to solicit and obtain listings and sales, leases, representation agreements or management contract of property, for the parties' mutual benefit, and to do so in accordance with law and the

ethical and professional standards as required in Paragraph 5 of this Agreement.

(R. 6; Add. Exh. 4; emphasis added).

Real estate development, which consists of building or constructing improvements upon real property clearly is not included with Paragraph 4. The only activities contemplated within the scope of the Agreement were "to solicit and obtain listings and sales, leases, representation agreements or management contract of property." (R. 6; Add. Exh. 4). Paragraph 4 of the Agreement precluded Mitchell from engaging in any real estate development with Prime Commercial. Conversely, Prime Commercial could have no proprietary interest in the joint venture and was limited to taking a listing agreement between the joint venture and Prime Commercial allowing Prime Commercial to engage in activities related to "sales, leases, representation agreements or management contract of property." (R. 6; Add. Exh. 4). There was no such listing agreement. Any alleged oral statements to the contrary clearly conflict with the express language of Paragraph 4 of the Agreement. The trial court correctly found that Prime Commercial had no interest in the Fong-Red Point joint venture nor any of the buy-out proceeds received by Red Point.

Prime's interpretation of Paragraph 11 renders Paragraph 4 entirely meaningless. If, as Prime suggests, Mitchell was required to engage in real estate development (building or constructing) in the name of Prime pursuant to Paragraph 11 even though real estate development is not one of the activities enumerated in Paragraph 4, the limiting language expressly stated in Paragraph 4 has no effect.

Moreover, there are a myriad of other activities which constitute "employment in connection with real estate" which obviously run contrary to the plain language of this real estate broker-agent agreement but nonetheless would require Mitchell to pay Prime if he engaged in those activities. For instance, the following types of employment are a limited list of endeavors connected to real estate: landscape maintenance, title insurance, mortgage originations, property insurance, roofing, paving, painting, heating and air conditioning, and appraising. Taking Prime's position to the logical extreme, in the event Mitchell decided to engage in any of the aforementioned activities, he would be obligated under Paragraph 11 of the broker-agent agreement to take such business in the name of Prime Commercial, notwithstanding the express language of Paragraph 4. This example demonstrates the absurdity of Prime's position. Clearly, this broker-agent agreement contemplated only the activities listed in Paragraph 4. The Agreement did not relate to real estate development. Prime's contentions to the contrary are unreasonable, untenable, and insufficient to create an issue of fact precluding summary judgment.

2. Prime's interpretation of Paragraph 11 is contrary to the purpose of the Agreement as a whole.

Not only is Prime's interpretation of Paragraph 11 contrary to the express language of Paragraph 4, it is also contrary to the purpose of the Agreement as a whole. The recitals at the beginning of the Agreement clearly set forth the nature of the relationship between the parties. Those recitals state:

WHEREAS, Broker is qualified to and does engage in business as a licensed general real estate broker in the State of Utah; and

. . . .

WHEREAS, Agent is now engaged in business as a licensed real estate agent; and

WHEREAS, the parties consider it to be to their mutual advantage to form the association hereinafter agreed to.

(R. 5; Add. Exh. 4). The activities contemplated by these recitals are those activities performed by licensed real estate brokers and agents. Those activities are specifically listed throughout the Agreement itself.

For instance, pursuant to Paragraph 1, Prime was to make current real estate listings available to Mitchell and to supply Mitchell with prospective listings in Prime's discretion. In Paragraph 2, Prime agreed to furnish advice, information and cooperation and Mitchell assumed and retained discretion for "methods, techniques and procedures used in soliciting and obtaining listings and sales, leases, or representation agreements." (R. 6; Add. Exh.4).

As previously mentioned, Mitchell agreed in Paragraph 4 to: "use Agent's best efforts to sell, lease or rent any and all real estate listed with Broker, to solicit additional listings and customers for Broker." In Paragraph 5, both Prime and Mitchell agreed "to conform to and abide by all laws, rules and regulations, and codes of ethics that are binding upon or applicable to real estate brokers or agents." (R. 6; Add. Exh.4).

None of these paragraphs and no other provisions of the Agreement address real estate development as an activity covered by the Agreement. In fact, even Paragraph 11,

upon which Prime bases its entire argument, refers to listings of property. This Agreement, is specifically limited to those activities connected with procuring listings for the Broker, selling, leasing, representing clients, or managing property. Prime simply cannot rely upon the phrase contained in Paragraph 11 in isolation. That phrase **must** be read in relation to the rest of Paragraph 11 as well as the rest of the Agreement. Real estate development was not contemplated within the language of the Agreement. Prime Commercial's interpretation of Paragraph 11 is not reasonable or tenable. As such, the trial court correctly determined that real estate development was not included in the scope of the Agreement and Prime was therefore not entitled to a portion of the proceeds from the Fong settlement (R. 935).

POINT THREE

THE TRIAL COURT CORRECTLY HELD THAT PARAGRAPH 18 OF THE AGREEMENT CONSTITUTED AN UNENFORCEABLE COVENANT NOT TO COMPETE.

Mitchell asserted in his Motion for Partial Summary Judgment, and the trial court agreed, that Paragraph 18 of the Agreement was not ambiguous and constituted an unenforceable covenant not to compete because it is not reasonable in its restrictions as to time and geographic area. (R. 935). Paragraph 18 states:

Agent shall not, after the termination of this Agreement, use to Agent's own advantage, or to the advantage of any other person or corporation, any information or materials gained for or from the files or business of Broker.

(R. 7; Add. Exh.4). Referring to the language of this paragraph, Prime Commercial claimed it was entitled to a percentage of commissions Mitchell earned after his termination with Prime Commercial and while he was an agent for another broker, Proactive. Prime Commercial reasoned that since Paragraph 18 prohibited Mitchell from "using any information or materials obtained from Prime" (R. 830), any contact Mitchell had with former Prime Commercial clients required him to compensate Prime Commercial.

A. Paragraph 18 constitutes a covenant not to compete.

A strict reading of Paragraph 18 would prevent Mitchell from earning a living in the manner of his choosing. Prime Commercial claimed that everything Mitchell knew about the real estate industry in general, Mitchell learned from Prime Commercial (R. 837). Obviously, if this were true, Mitchell would have violated Paragraph 18 if he engaged in any real estate marketing or sales after his termination with Prime Commercial.

In order to inject any plausibility into Prime Commercial's position, Prime Commercial changed its strategy and narrowed its argument at the summary judgment stage to claim that Mitchell violated Paragraph 18 by engaging in business with former or potential clients of Prime Commercial after his termination (R. 830). Even with this change in position, Paragraph 18 nonetheless constitutes a covenant not to compete, since it places — at a minimum — monetary restrictions on Mitchell's ability to engage in the real estate profession.

In Prime's Brief of Appellant, Prime cites to Robbins v. Finlay for the proposition that "an employee may be prevented from using customer leads gained from a former employer, even in situations where a covenant not to compete would be unenforceable." (Brief of Appellant at 20). Prime suggests that Paragraph 18 merely restricts Mitchell from using client leads he received from Prime once he leaves Prime, and thus is not a covenant not to compete. Prime next cites to the Alaskan case of Metcalf Investments v. Garrison, 919 P.2d 1356 (Alaska 1996) as further support for its proposition. However, one glaring difference sets the instant case apart from both Robbins and Metcalf.

Robbins involved a contractual covenant which related to a list of prospects for and users of hearing aids. 645 P.2d at 624, n.1. The contract identified the list of prospects as a trade secret, specifically prohibited the salesman from making a copy of the list, required the salesman to use it only in the course of the company's business and to return the list upon termination of his employment. The contract further prohibited the salesman from using the list to the detriment of the company. Id.

Similarly, in Metcalf, the agent had specifically agreed not to use the broker's client list after leaving her employment and she further agreed "not to participate in sales to potential buyers who had first made contact" with the broker. 919 P.2d at 1361. In both

Robbins and Metcalfe, the covenants were narrowly tailored to restrict only the use of client lists.¹

This is not so in the present case. Paragraph 18 was not narrowly tailored to restrict the use of client or prospective client lists. Rather, Paragraph 18 clearly prohibited the use of "any information or materials gained for or from the files or business of Broker." There is no language restricting "any information or materials" to only client lists. The word "any" is all inclusive and encompasses everything Mitchell could have possibly learned or acquired from Prime including such items as the Utah standard form real estate purchase contract, the Multiple Listings Service real estate listing publications, or copies of newspaper advertisements of property for sale — basic tools of the trade. The fact that Paragraph 18 restricts Mitchell from using "any information or materials" rather than only restricting him from using prospective client lists, underscores that this paragraph is a covenant not to compete rather than merely a restriction on the use of proprietary information. Thus, the question becomes whether the covenant not to compete contained within Paragraph 18 is enforceable.

B. The covenant not to compete contained within Paragraph 18 of the Agreement is unenforceable.

¹Notably, the Metcalfe Court emphasized that by its decision it was not holding "that all restraints on contacting former customers will be found to be reasonable." Id. at 1362, n. 5. The Court identified several circumstances in which such a clause would not be reasonable; for instance, where the former employee did not have access to confidential information. Id. The case of Metcalfe is hardly persuasive authority for modifying case law that has served Utah courts well for more than forty years.

Utah courts have long recognized that covenants not to compete are "necessary for the protection of the goodwill of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his former employer, if he were permitted to compete nearby." Kasco Servs. Corp. v. Benson, 831 P.2d 86, (Utah 1992); (quoting System Concepts, Inc. v. Dixon, 669 P.2d 421, 426 (Utah 1983); Allen v. Rose Park Pharmacy, 120 Utah 608, 617, 237 P.2d 823, 827-28 (1951)). However, in order to be enforceable, Utah courts have uniformly required that they be "carefully drawn to protect only the legitimate interests of the employer." Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982).

"The reasonableness of a covenant depends upon several factors, including its geographical extent; the duration of the limitation; the nature of the employee's duties; and the nature of the interest which the employer seeks to protect such as trade secrets, the goodwill of his business, or an extraordinary investment in the training or education of the employee." Robbins 645 P.2d at 627 (emphasis added); Kasco Servs. Corp. v. Benson, 831 P.2d 86, n. 1 (Utah 1992) (the restriction must be reasonable in time and geographic area); Allen v. Rose Park Pharmacy, 120 Utah 608, 619, 237 P.2d 823, 828 (Utah 1951). In the instant case, Paragraph 18 fails to contain several of the above listed characteristics; most notably, there are no reasonable restrictions as to time and geographical scope. Accordingly, Paragraph 18 constitutes an unreasonable and unenforceable covenant not to compete.

Once again, Prime in its brief has attempted to create an ambiguity within the Agreement where none existed. Prime contends that as long as its position — that "any information or materials" refers to customer lists — is tenable, the contract term was ambiguous and summary judgment was inappropriate. (Brief of Appellant at 23-25). This position, however, is disingenuous and contrary to Prime's position on summary judgment. Before the trial court, Prime argued that attempts "to limit the terms of paragraph 18 to only "Prime listings," are not persuasive as paragraph 18 specifically precludes Mitchell from using 'information or materials gained for or from the files and business' of Prime." (R. 830). Similarly, the affidavit of William K. Martin, submitted by Prime, states:

8. Accordingly, pursuant to paragraph 18 of his contract with Prime and the standard in the commercial real estate industry, Mitchell should have provided a portion of his commissions earned for one year after he left Prime to Prime especially where Mitchell engaged in real estate transactions with individuals or entities who were customers of Prime.

(R. 878) (emphasis added). Notably, Prime's "expert" did not attest that Mitchell should have provided only a portion of commissions earned from former or current Prime clients. Prime's position on summary judgment was that paragraph 18 entitled Prime to recover on any of Mitchell's commissions for up to one year after Mitchell left Prime, meaning that paragraph 18 referred to more than merely client lists.

In the instant case, there was no genuine issue of material fact before the trial court as to the meaning of "any information and materials" as contained in Paragraph 18 of the Agreement. The trial court correctly determined that Paragraph 18 was not ambiguous and

not enforceable. While it is true that "the choice of contract interpretations which avoid invalidating an agreement is favored under Utah law," Coulter & Smith, Ltd. V. Russell, 966 P.2d 852, 857-58, this case represents a "clear[]" situation" where the contract provision must be invalidated, especially in light of the well settled rule that courts "will not rewrite a contract to alleviate a contracting party's mistake, but will construe it according to its terms as written." Howe v. Professional Manivest, Inc., 829 P.2d 160, 164 (Utah App. 1992); Hoth v. White, 799 P.2d 213, 217 (Utah App. 1990). To the extent that on appeal Prime now seeks to limit the language of Paragraph 18 to be "prospective client lists" instead of "any information or materials," such was a mistake that Prime made in drafting the contract. This court should not take upon itself to rewrite the terms of the contract now that a dispute among the contracting parties has arisen, especially where the trial court correctly determined the language to be clear and unambiguous.

C. This appellate court should not inject into the Agreement additional contract terms as to time and geographical limitations of paragraph 18.

Prime contends that the trial court could have easily read geographical and time limitations into Paragraph 18 thereby rendering that covenant enforceable. This argument fails, however, for several reasons. First, even if reasonable geographical and time limitations were read into Paragraph 18, that paragraph would still constitute an unenforceable covenant not to compete since the broad language of the paragraph as written restricts Mitchell from using any tools of the trade he learned while working with Prime. Before the trial court, Prime failed to present evidence to show that Paragraph 18, as written,

was "necessary to protect the goodwill of the business." System Concepts, Inc. v. Dixon, 669 P.2d at 421 (Utah 1983).

Not only would the trial court have had to insert additional terms as to time and geographical location, the trial court would have had to rewrite the paragraph to restrict Mitchell from using specific items such as prospective client lists in order to tailor the contract language to protect any legitimate business interest. Again, trial courts are discouraged from rewriting contract terms to alleviate a contracting party's mistake. Howe 829 P.2d at 164. Merely inserting geographical and time limitations into Paragraph 18 would not save the covenant not to compete. The requirement contained in Paragraph 18 prohibiting Mitchell from using "any information or materials" simply is not necessary to protect the business of Prime.

Second, Prime completely failed to present the trial court with any evidence to consider in determining a reasonable geographical limitation to insert into Paragraph 18. While Prime did argue that a time limitation of one year would be reasonable, Prime utterly neglected the issue of a reasonable geographical limitation for insertion. Thus the trial court was left with no evidence from which to base any determination regarding geography. In an obvious and belated attempt to remedy Prime's prior neglect on this issue, Prime claims on appeal that such geographical evidence would not be necessary, based upon the case, System Concepts, Inc. v. Dixon, 669 P.2d 421, 427 (Utah 1983), (Brief of Appellant at 27).

Yet the facts of System Concepts were so unique as to render it completely distinguishable from the case at hand.

System Concepts involved a covenant not to compete between a cable television equipment manufacturer and its former national sales director. Id. At 424. Importantly, there was no question that the services rendered by the former national sales director were "special, unique or extraordinary." Id. At 426. The record reflected that "defendant's position as national sales manager entailed responsibilities which were special and unique in comparison to other employees with sales-related positions. In that case, the Utah Supreme Court in rendering its opinion noted the distinguishable circumstances, stating:

The business being protected in this case (cable television) is not one which is sought locally by a localized clientele. Due to the recent inception of the cable television industry, the entire market for SCI's products is limited to approximately 2,500 potential customers, all of which are located within the United States. In light of the industry's inherent limitations and the nature of defendant's particular employment, it was not unreasonable for SCI to omit from the covenant a specific and explicit spacial restriction. The covenant is impliedly limited to the area in which SCI has been and is seeking its market. Furthermore, the breadth of the covenant is sufficiently limited by specific activity restrictions, which, under the peculiar circumstances of this case, have greater utility and propriety than spacial restrictions.

Id. At 427.

Clearly, the instant case is not even remotely similar to the facts of System Concepts. There was no evidence presented to the trial court to show that Mitchell's duties with respect to Prime were "special, unique or extraordinary." Mitchell was a real estate agent as were many others working with Prime. Likewise, there was no evidence presented to the trial

court to suggest that the real estate industry in which Prime and Mitchell were engaged was relatively new, specialized, unique or inherently limited. In short, there was no evidence to suggest that "the breadth of [Paragraph 18] is sufficiently limited by specific activity restrictions, which . . . have greater utility and propriety than spacial restrictions." Accordingly, there is no basis whatsoever for justifying any departure from Utah's long standing precedence that a covenant not to compete must "be reasonable in its restrictions as to time and area." Allen v. Rose Park Pharmacy, 273 P.2d 823, 828 (Utah 1951) (emphasis added); Kasco Services Corp. V. Benson, 831 P.2d 86, 97, n.1 (Utah 1992); Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982).² The trial court correctly applied the law in determining that Paragraph 18 was unenforceable since it lacked reasonable restrains as to time and geographic location (R. 936).

D. The enforcement of Paragraph 18 as sought by Prime would violate Utah law.

Prime argued before the trial court that Prime was entitled to a portion of Mitchell's commissions earned with his new broker for a period of up to one year after he left Prime for violating Paragraph 18 of the Agreement. (R. 830-32; 878; 955 at p. 22). However, enforcement of Paragraph 18 as suggested by Prime runs afoul of Utah law (R. 955 at p. 12-13). Section 61-2-10(3) of the Utah Code provides that "No sales agent or associate broker

²See also Abramson v. Blackman, 166 N.E.2d 729, 730 (Mass. 1960) (striking covenant not to use information for indefinite period); Cohen Realty, Inc. v. Marinick, 817 P.2d 747, 749 (Okla.App. 1991) (refusing to enforce covenant with no geographical limit); and Pancake Realty Co. V. Harber, 73 S.E.2d 438, 443 (W.Va. 1952) (striking covenant without territorial limits).

may affiliate with more than one principal broker at the same time." In fact, an agent may be subject to a civil penalty if he is found guilty of "representing or attempting to represent a broker other than the principal broker with whom he is affiliated, or representing as sales agent or having a contractual relationship similar to that of sales agent with other than a licensed principal broker." U.C.A. § 61-2-11 (1997).

If Mitchell were forced to share with Prime for one year the commissions he earned while working and licensed with Proactive, he essentially would be acting on behalf of Prime in a "relationship similar to that of sales agent" in violation of Section 61-2-11.

"It is the generally accepted doctrine of this country that every contract in violation of law is void. It is equally true that our courts will not lend their aid to the enforcement of nor permit a recovery of compensation under, contracts made and entered into in violation of the law prohibiting them or declaring them to be unlawful." Baker v. Latses, 206 P. 553, 555 (Utah 1922); Haddock v. Salt Lake City, 23 Utah, 527, 65 P. 491 (Utah 1901).³ Prime's interpretation of Paragraph 18 is in violation of Utah statutory law and therefore is unenforceable. Furthermore, the fact that Prime's interpretation of Paragraph 18 renders the contract clause illegal also supports the conclusion that Prime's interpretation of Paragraph 18 is not reasonable or tenable. Therefore, there is no basis for looking beyond the plain language of Paragraph 18. As written, Paragraph 18 of the Agreement plainly and

³See also 17A AMJUR 2D *Contracts* § 247: "As a general rule, an agreement which violates a provision of the federal or a state constitution, or of a constitutional statute, or which cannot be performed without violating such a provision, is illegal and void."

unambiguously constitutes an unenforceable covenant not to compete. The trial court was correct in so finding.

CONCLUSION

For the foregoing reasons, Plaintiff and Appellee Brent Mitchell respectfully requests that this Court dismiss Prime's appeal based upon the consent judgment, or alternatively, to uphold the trial court's Order on Summary Judgment. Mitchell further requests that this Court award Mitchell its costs incurred in defending this appeal pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

DATED this ____ day of February, 1999.

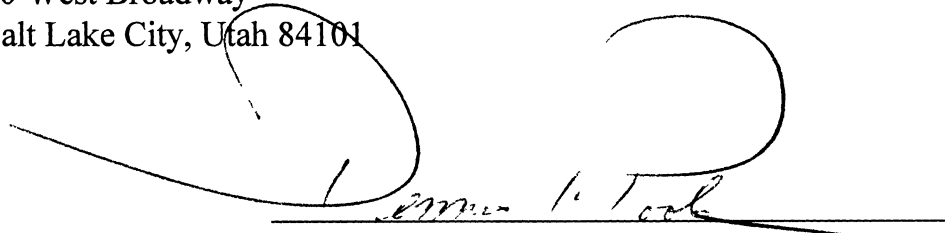
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DENNIS K. POOLE
ANDREA NUFFER GODFREY
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff and Appellee Brent
Mitchell

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, U.S. Mail, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE** to the following this 12 day of February, 1999:

Thomas R. Karrenberg
Nathan B. Wilcox
Stephen P. Horvat
ANDERSON & KARRENERG
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Stephen P. Horvat", is written over a horizontal line. The signature is stylized with large, sweeping loops.

ADDENDUM

1. Stipulation (R. 924-25)
2. Order and Judgment (R. 926-28)
3. Order of Summary Judgment (R. 929-37)
4. Agreement (R. 5-11)
5. Complaint (R. 1-11)
6. Answer and Counterclaim (R. 32-37)
7. Affidavit of Brent Mitchell (R. 297-306)

Tab 1

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Telephone: (801) 263-3344
Fax: (801) 263-1010



**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH**

| | | |
|---------------------------------|---|------------------------|
| BRENT D. MITCHELL, | : | |
| | : | STIPULATION |
| Plaintiff, | : | |
| vs. | : | |
| PRIME COMMERCIAL, INC., a Corp- | : | |
| oration, and SALT LAKE BOARD OF | : | |
| REALTORS, A Corporation, | : | CIVIL NO. 950906465 CV |
| Defendants. | : | JUDGE ANNE M. STIRBA |

PLAINTIFF BRENT D. MITCHELL, by and through his attorney, Dennis K. Poole, and Defendant Prime Commercial, Inc, by and through its attorney, Nathan B. Wilcox, do hereby stipulate, agree and move as follows:

1. The parties hereto agree and stipulate that Judgment be entered against Defendant Prime Commercial, Inc. for \$52,828.38, being the sum of the following:

(i) \$20,544.69 representing commissions payable to Plaintiff Brent Mitchell and earned under a Broker Agent Agreement dated January 1, 1994, for the following transactions:

| | | |
|------------------------|----------|-------------|
| Stewart - Farnsworth | 8/16/94 | \$ 111.06 |
| Stewart - Brenkenridge | 9/13/94 | \$ 2,826.25 |
| Fong - Kessimakis | 11/16/94 | \$ 3,219.38 |
| Fong - Kessimakis | 11/16/94 | \$ 2,856.75 |
| Reynolds - Triple K | 5/8/95 | \$11,531.25 |

- (ii) \$6,783.69 representing interest at 10% per annum upon the commissions due above from the date specified through June 1, 1998, together with
- (iii) in accordance with the terms of the Broker Agent Agreement, attorney's fees and costs in the amount of \$25,500.00.

2. The parties hereto stipulate and agree that the Judgment against Defendant Prime Commercial, Inc. shall provide for augmentation for attorney's fees and costs incurred in collection.


3. The parties hereto agree and stipulate that interest on the Judgment shall accrue at the legal post-judgment interest rate until paid.

4. The parties hereto hereby move that this Court vacate the trial date currently scheduled for June 2, 1998, and enter Judgment against Defendant Prime Commercial, Inc. consistent with the terms herein contained.

DATED this 29 day of May, 1998.


DENNIS K. POOLE
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff

DATED this 29th day of May, 1998.


NATHAN B. WILCOX
ANDERSON & KARREBERG
Attorneys for Defendant

Tab 2

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ANDREA NUFFER GODFREY (6623)
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107
Telephone: (801) 263-3344
Fax: (801) 263-1010

JUDGMENT
(2625)

FILED DISTRICT COURT
Third Judicial District:

JUN - 3 1998

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

2223234
6-5-98

| | | |
|---------------------------------|---|---------------------------|
| BRENT D. MITCHELL, | : | |
| | : | ORDER AND JUDGMENT |
| Plaintiff, | : | |
| vs. | : | |
| PRIME COMMERCIAL, INC., a Corp- | : | |
| oration, and SALT LAKE BOARD OF | : | |
| REALTORS, A Corporation, | : | CIVIL NO. 950906465 CV |
| Defendants. | : | JUDGE ANNE M. STIRBA |

This Court, having considered the Stipulation of Plaintiff Brent Mitchell and Defendant Prime Commercial, Inc., and for good cause appearing, does

HEREBY ORDER, ADJUDGE AND DECREE as follows:

1. The trial date of Tuesday, June 2, 1998 is hereby vacated.
2. Judgment against Defendant Prime Commercial, Inc. and in favor of the Plaintiff Brent D. Mitchell is hereby entered in the amount of \$52,828.38 (which

judgment includes attorneys' fees and costs in accordance with the terms of the parties' stipulation).

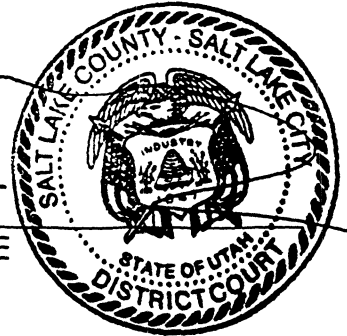
3. This Judgment shall be augmented by affidavit to include Plaintiff's costs and attorney's fees incurred in collecting the Judgment.

4. This Judgment shall continue to accrue at the legal post-judgment interest rate of 7.46 % per annum until paid.


DATED this 3rd day of June, 1998.

BY THE COURT:


DISTRICT COURT JUDGE



Approved as to Form:

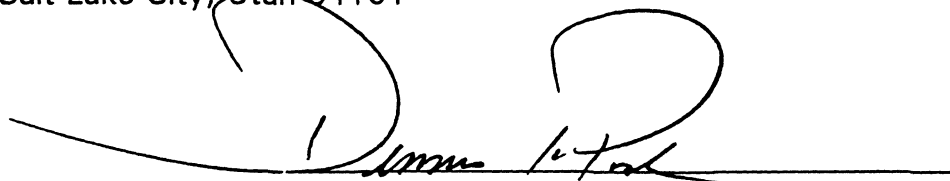

NATHAN B. WILCOX
ANDERSON & KARRENBURG
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing **ORDER AND JUDGMENT** was mailed, U.S. Mail, postage prepaid to the following this 7 day of

June
~~May~~, 1998:

Nathan B. Wilcox, Esq.
ANDERSON & KARRENBURG
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

A large, stylized handwritten signature, likely of Nathan B. Wilcox, is written over a horizontal line. The signature is in dark ink and features large, sweeping loops.

Tab 3

FILED DISTRICT COURT
Third Judicial District

DENNIS K. POOLE (2625)
ANDREA NUFFER GODFREY (6623)
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Telephone: (801) 263-3344
Telecopier: (801) 263-1010
Attorneys for Plaintiff

JUN - 5 1998
SALT LAKE COUNTY
By Nathan Wilcox
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------|---|----------------------------------|
| BRENT D. MITCHELL, | : | |
| | : | |
| Plaintiff, | : | ORDER OF SUMMARY JUDGMENT |
| | : | |
| vs. | : | |
| | : | |
| PRIME COMMERCIAL, INC., a | : | Civil No. 950906465 CV |
| Corporation, and SALT LAKE | : | |
| BOARD OF REALTORS, a | : | |
| Corporation, | : | JUDGE ANNE M. STIRBA |
| | : | |
| Defendants. | : | |

On the 8th day of May, 1998, Plaintiff's Motion for Partial Summary Judgment came on for hearing before the Honorable Anne M. Stirba. The Plaintiff appeared by and through his attorney, Dennis K. Poole, and the Defendant Prime Commercial, Inc. appeared by and through its attorney, Nathan Wilcox. The Court having considered the affidavits and memoranda in support of and in opposition to such Motion for Partial

Summary Judgment and having determined that there are no genuine issues of material fact which are set forth as follows:

1. Plaintiff Brent D. Mitchell ("Mitchell"), an individual, and the Defendant Prime Commercial, Inc. ("Prime Commercial"), a corporation, entered into an agreement dated January 1, 1994, designated by the parties as a broker-agent agreement (the "Agreement"), whereby Mitchell agreed to act as an independent licensed real estate agent for Prime Commercial, as broker.

2. Paragraph 7 of the Agreement states:

The division and distribution of the earned commissions pursuant to Paragraph 6 of this Agreement shall take place as soon as feasible after collection of such commissions from the party or parties for whom the services may have been performed. Any suit for the collection of commissions from clients shall be maintained only in the name of Broker. Agent shall not be entitled to any advance or payment from Broker upon future commissions or commissions earned but uncollected. Agent's only remuneration shall be Agent's share of the commissions paid by the party or parties for whom services were performed. Any advances paid to agents must be approved by Broker and must be documented by a note.

3. Paragraph 11 of the Agreement states:

In accordance with law, Agent agrees that any and all listings of property, and all employment in connection with the real estate business shall be taken in the name of Broker. Listings shall be filed with Broker within twenty four (24) hours after receipt of any such listing by Agent. In consideration for the commission payable to Agent pursuant to the terms of this Agreement, Agent agrees to and does hereby contribute all right and title to any and all listings solicited and obtained by Agent to Broker for the benefit and use of Broker, Agent and all other agents associated with Broker to whom Broker may give the listing; provided, however, that Agent shall have the rights provided in Paragraph 12 of this Agreement with respect to listings procured by Agent prior to termination.

4. Paragraph 18 of the Agreement states:

Agent shall not, after the termination of this Agreement, use to Agent's own advantage, or to the advantage of any other person or corporation, any information or materials gained for or from the files or business of Broker.

5. Paragraph 4 of the Agreement states:

Until termination of this Agreement, Agent agrees to work diligently and use Agent's best efforts to sell, lease or rent any and all real estate listed with broker, to solicit additional listings and customers for Broker and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this Agreement may derive the greatest profit possible, provided that nothing in this Agreement shall be construed to require Agent to handle or solicit particular listings or authorize Broker to direct or require that Agent do so. Agent agrees to perform no other activities in association with Broker, except to solicit and obtain listings and sales, leases, representation agreements or management contract of property, for the parties' mutual benefit, and to do so in accordance with law and the ethical and professional standards as required in Paragraph 5 of this Agreement.

6. After January 1, 1994, Mitchell became a member and manager of Red Point Equity, L.L.C. ("Red Point"), a limited liability company engaged in the business of real estate development.

7. Mitchell became a member of Red Point which was organized to pursue real estate development activities. The other member and manager of Red Point was Mitchell's spouse.

8. In 1994, Red Point entered into a joint venture agreement with Leonard K.M. Fong ("Fong") for the development of a planned unit development on property located on Atwood Boulevard in Murray, Utah.

9. In furtherance of the joint venture agreement and with the assistance of Mitchell acting as a real estate agent of Prime Commercial, Fong acquired the real property located on Atwood Boulevard from unrelated third parties resulting in the payment of real estate commissions to Prime Commercial.

10. As a member in the joint venture, Red Point was to participate in a share of the profits.

11. Fong and Mitchell also agreed that once the planned unit development was completed, Mitchell, as an agent of Prime Commercial, would market and sell the individual units pursuant to a listing agreement the joint venture would enter into with Prime Commercial.

12. Fong subsequently refused to finance construction of the planned unit development, thereby breaching the joint venture agreement between Fong and Red Point.

13. As a consequence of Fong's breach, Red Point commenced an action in the Third Judicial District Court entitled Red Point Equities, L.C. v. Leonard K.M. Fong, Civil No. 9509093430CN. With the filing of the Complaint against Fong, Red Point recorded a lis pendens in the offices of the Salt Lake County Recorder.

14. To settle the claims in the Fong litigation, Fong purchased Red Point's interest in the joint venture for \$15,000.00. The settlement amount paid was solely attributable to Red Point's interest in the joint venture. Neither Mitchell nor Prime Commercial had a listing agreement to sell any interest Red Point had in the joint

venture with Fong. Consequently, no portion of the settlement was for any commissions on the sale of finished or unfinished units.

15. At the time that Fong purchased Red Point's interest in the joint venture, the joint venture had not entered into any listing agreement with Prime Commercial for the listing or sale of any of the finished units because no development or construction had commenced.

16. Mitchell's agency relationship with Prime Commercial was terminated on or about August 31, 1994.

17. When Mitchell was not paid commissions in accordance with the terms of the Agreement for closings which were pending at the date of his termination and thereafter closed, Mitchell commenced this suit. In response to such claims, Prime Commercial counterclaimed asserting that Mitchell was obligated to pay commissions for new transactions subsequently entered into by Mitchell, including but not limited to alleged transactions for five properties previously listed by Mitchell while at Prime.

18. On or about the 30th of May, 1995, Prime Commercial notified Mitchell through counsel of the amount of commissions due Mitchell for closed transactions (the "Closed Transactions") together with the five specific properties listed with Prime Commercial and procured by Mitchell prior to his leaving Prime Commercial for which potential commissions were claimed by Prime Commercial. The five properties previously listed by Mitchell for Prime Commercial were as follows: (i) 6-Plex - 479

East 5600 South; (ii) 2.5 acres at Alta; (iii) Alta Pines - 4070 South 900 East; (iv) Landing Point - 176 North Redwood Rd; and (v) 2.2 acres - W. Jordan.

19. Of the above five designated properties, only three of them were under a current listing with Prime Commercial at the time Mitchell left. The 6-Plex property had been previously sold for which Prime Commercial received a commission, and there were no current listings with Prime Commercial for that property at the time Mitchell terminated his association with Prime Commercial. Also, Mitchell never had a listing agreement with Prime Commercial or any other brokerage for the acreage in West Jordan.

20. Other than the listings for the Closed Transactions for which Mitchell claims commissions from Prime Commercial, and except for the three listings which did not result in closings, Mitchell had no other listings at the time he left Prime Commercial.

21. Mitchell received no commission from any of the three listings he had at the time he left Prime Commercial, each Prime Commercial listing having expired prior to the procurement of a buyer.

22. Of the three properties for which Mitchell had listing agreements with Prime Commercial at the time Mitchell left Prime Commercial, Mitchell has not listed any of those properties with any other broker, nor has Mitchell collected commissions from any sale of such properties.

23. In its counterclaim and/or its affidavits in opposition to Plaintiff's Motion for Partial Summary Judgment, Prime Commercial makes claim for commissions on all Mitchell transactions for a period after termination of his agency relationship with Prime Commercial based upon the terms of the Agreement, or based upon a separate oral understanding.

24. No evidence of a written modification to the Agreement was offered by either party.

Based upon the foregoing undisputed facts, the Court finds as a matter of law as follows:

1. The Agreement between Mitchell and Prime Commercial is an integrated contract as more particularly set forth in Paragraph 19(b) of the Agreement.

2. The Agreement defines the relationship and duties between the parties, specifically limiting Mitchell's duties to soliciting and obtaining listings and sales, leases, representation agreements or management contracts of property for the parties' mutual benefit. Such duties do not include development activities and do not preclude Mitchell from pursuing such activities outside of the scope of the Agreement.

3. The Agreement further provides that it may not be amended except in writing signed by the parties.

4. Because the Agreement has no facial ambiguity and does not cover development activities, and because there was no amendment to the Agreement providing otherwise, Prime Commercial is not entitled to participate in any

consideration paid to Red Point (even if construed to be for the benefit of Mitchell) for profits or an interest in a development joint venture with Fong.

5. Because the Agreement, specifically Paragraph 18, contains no facial ambiguity, and because the use of any information or materials gained by Mitchell from Prime Commercial would prohibit any competition by Mitchell, such restriction is unenforceable as a matter of law.

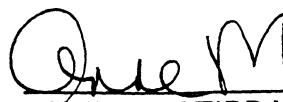
6. Because Paragraph 18 is not ambiguous and because the contract is an integrated contract, the Defendant is not entitled to rely upon parol evidence, including but not limited to alleged industry standards of additional terms imposed upon agents after their termination with a brokers.

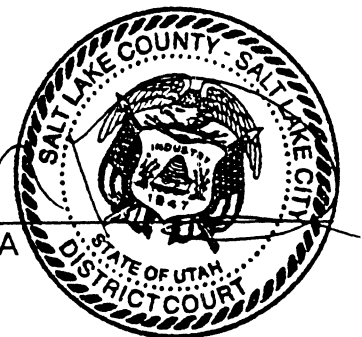
7. There is no reference in Paragraph 18 to either a restriction in time or geographic area for the use of such information and Paragraph 18 is, therefore, unenforceable.

8. As a consequence, the Plaintiff's Motion for Partial Summary Judgment is hereby granted dismissing the counterclaims of the Defendant Prime Commercial against the Plaintiff Brent D. Mitchell.

ORDER DATED this 5th day of June, 1998.

BY THE COURT:


ANNE M. STIRBA
District Judge

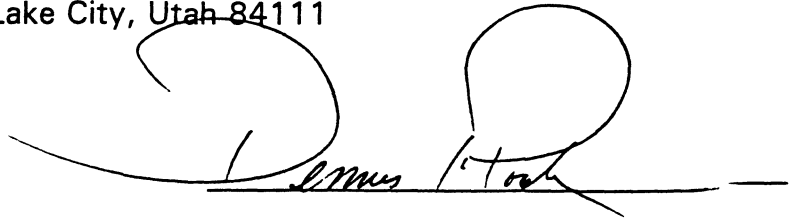


MAILING CERTIFICATE

I hereby certify that a true and correct copy of the above and foregoing ORDER OF SUMMARY JUDGMENT in Case No. 950906465 CV was mailed, postage prepaid, United States Mail, the 29 day of May, 1998, to the following:

Thomas R. Karrenberg, Esq.
ANDERSON & KARRENBURG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

Douglas E. Grant, Esq.
Randall E. Grant, Esq.
GRANT & GRANT
349 South 200 East, Suite 410
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Douglas E. Grant", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Tab 4

PRIME

THIS AGREEMENT, made this 1st day of January, 1994 by and between PRIME COMMERCIAL, INC. ("Broker"), and Brent D. Mitchell ("Agent") an individual authorized to act as a licensed real estate agent in the State of Utah.

WITNESSETH:

WHEREAS, Broker is qualified to and does engage in business as a licensed general real estate broker in the State of Utah; and

WHEREAS, Group maintains an office in the State of Utah, properly equipped with furnishings and other equipment necessary and incidental to the proper operation of said business, and staffed suitably to serve the public as a real estate broker; and

WHEREAS, Agent is now engaged in business as a licensed real estate agent; and

WHEREAS, the parties consider it to be to their mutual advantage to form the association hereinafter agreed to.

NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, the parties hereto agree as follows:

Broker agrees to make available to Agent, at Agent's request, all current listings in the Broker's office. In addition, at Agent's discretion and at Agent's request, Broker may, from time to time, supply Agent with prospective listings. Nothing herein stated shall be construed to require Agent to accept or service any particular listing or prospective listing offered by Broker, nor shall Broker have any right or authority to direct that Agent see or service particular parties, or to restrict Agent's activities to particular areas. Broker shall have no right, except to the extent required by law, to direct or limit Agent's activities as to hours, leads, open houses, opportunity or floor time, prospects, sales, sales meetings, schedule, services, inventory, time off, training, vacations, or similar activities.

At Agent's request and in Agent's sole discretion, Broker agrees to furnish such advice, information and full cooperation as Agent shall decide. Broker agrees that by furnishing any such advice, information or cooperation, Broker obtains no authority or right to direct or control Agent's actions except as specifically required by law and that Agent assumes and retains discretion for methods, techniques and procedures used in soliciting and obtaining listings and sales, leases, or representation agreements.

3. Broker agrees that Agent may share with other agents all the facilities of the office now operated by Broker in connection with the subject matter of this Agreement, which office is now maintained at 4505 South Wasatch Blvd., Suite 120, Salt Lake City, Utah 84124.
4. Until termination of this Agreement, Agent agrees to work diligently and use Agent's best efforts to sell, lease or rent any and all real estate listed with Broker, to solicit additional listings and customers for Broker and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this Agreement may derive the greatest profit possible, provided that nothing in this Agreement shall be construed to require Agent to handle or solicit particular listings or authorize Broker to direct or require that Agent do so. Agent agrees to perform no other activities in association with Broker, except to solicit and obtain listings and sales, leases, representation agreements or management contract of property, for the parties' mutual benefit, and to do so in accordance with law and the ethical and professional standards as required in Paragraph 5 of this Agreement.
5. Agent agrees to commit no act of a type for which the Securities Commission or the Board of Real Estate Examiners of the State of Utah is authorized to suspend or revoke the license of either Agent or Broker. Broker and Agent agree to conform to and abide by all laws, rules and regulations, and codes of ethics that are binding upon or applicable to real estate brokers or agents.
6. Broker's typical and customary commissions from time to time in effect, shall be charged to the parties for whom services are performed, except that Broker may agree in writing to other rates with such parties. Broker will advise all agents associated with Broker of any special commission rates made with respect to the listings as provided in this paragraph. When Agent shall perform any services under this Agreement for which a commission is earned, the commission shall, when collected, be divided between Broker and Agent as set forth in the Commission Schedule attached hereto as Exhibit A and incorporated herein by reference, unless Broker and Agent agree in writing upon a different method of dividing the commission before completion of any particular transaction. In the event that two or more agents participate in any service which is subject to this Agreement, or claim to have done so, the amount of the commission over that accruing to Broker shall be divided between the participating agents according to agreement between them or by arbitration. In no case shall Broker be personally liable to Agent for Agent's share of any commission not collected, nor shall Agent be personally liable to Broker for any commissions not collected. In compliance with the laws of the State of Utah, all commissions will be received by Broker. When any commission shall have been collected from the party or parties for whom the service was performed, Broker shall hold the same in trust for Agent and Broker to be divided between them according to the terms of this Agreement. Agents shall not have the right to negotiate commissions with current or prospective clients without first discussing same with Broker and obtaining permission from Broker.
7. The division and distribution of the earned commissions pursuant to Paragraph 6 of this Agreement shall take place as soon as feasible after collection of such commissions from the party or parties for whom the services may have been performed. Any suit for the collection of commissions from clients shall be maintained only in the name of Broker. Agent shall not be entitled to any advance or payment from Broker upon future commissions or commissions earned but uncollected. Agent's only remuneration shall be Agent's share of the commissions paid by the party or parties for whom services were performed. Any advances paid to agents must be approved by Broker and must be documented by a note.

8. Broker shall not be liable to Agent for any expenses incurred by Agent, or for any of Agent's acts except as specifically required by law, nor shall Agent be liable to Broker for office help or expense. Agent shall have no authority to bind Broker by any promise or representation unless specifically authorized in writing in a particular transaction. Expenses that must, by reason of some necessity, be paid from the commission, or are incurred in the collection of, or the attempt to collect, the commission, shall be paid by the parties in the same proportion as the commission, divided pursuant to the terms of this Agreement.
9. Agent agrees to provide and pay for all Agent's necessary professional licenses and dues; Broker shall not be liable to reimburse Agent therefor. In the event that Broker elects to advance sums to Agent for the payment of Agent's professional licenses, dues or other items, Agent agrees to repay such advances to Broker upon demand and Broker may deduct such advances from commissions otherwise payable to Agent.
10. This Agreement does not constitute a hiring by either party. It is the parties' intention that, so far as shall be in conformity with law, Agent shall be an independent contractor and not Broker's employee, and in conformity therewith, that Agent retain sole and absolute discretion and judgment in the manner and means of carrying out Agent's selling and soliciting activities. Therefore, the parties hereto are and shall remain independent contractors bound by the provisions of this Agreement. Agent is under the control of Broker as to the result of Agent's work only and not as to the means by which such is accomplished. This Agreement shall not be construed as a partnership and Broker shall not be liable for any obligation incurred by Agent.
11. In accordance with law, Agent agrees that any and all listings of property, and all employment in connection with the real estate business shall be taken in the name of Broker. Listings shall be filed with Broker within twenty four (24) hours after receipt of any such listing by Agent. In consideration for the commission payable to Agent pursuant to the terms of this Agreement, Agent agrees to and does hereby contribute all right and title to any and all listings solicited and obtained by Agent to Broker for the benefit and use of Broker, Agent and all other agents associated with Broker to whom Broker may give the listing; provided, however, that Agent shall have the rights provided in Paragraph 12 of this Agreement with respect to listings procured by Agent prior to termination.
12. On completion of any work-in-process, this Agreement may be terminated, with or without cause, by Broker or Agent at any time. Broker may terminate this Agreement on the occurrence of any of the following causes:
 - (a) An election of Broker to sell its entire business or to cease doing business;
 - (b) Any breach of this Agreement by Agent;
 - (c) Suspension, revocation, or other termination of Agent's license;
 - (d) Failure of Agent to comply with any applicable law or regulation of either the Securities Commission or the Board of Real Estate Examiners;
 - (e) Conviction of Agent of any crime other than minor traffic offenses.
13. Upon termination of this Agreement, Agent's regular proportionate share of the commissions on any sales Agent has made that are not closed shall, upon the closing of such sales, be paid to Agent, if collected by Broker. Except in cases of termination

for cause, Agent shall also be entitled to receive the portion of the commissions, received by Broker after termination, allocable to the listing (but not the sale) as set forth in Broker's current commissions schedules, on any listings procured by Agent during Agent's association with Broker.

14. If, upon termination of this Agreement, Agent fails to complete work on any pending transactions that normally would be rendered by Agent, Broker shall make arrangements with another agent in Broker's organization to perform such work and shall be compensated for completing the details of pending transactions and such compensation shall be deducted from Agent's share of the commission.
15. In the event of disagreement or dispute between Agent and any other agent associated with Broker, or between Broker and Agent arising out of or connected with this Agreement which cannot be adjusted by and between the parties involved, the dispute or disagreement shall be submitted to the Real Estate Board of which Broker is a member for arbitration pursuant to the provisions of its bylaws, said provisions being hereby incorporated by reference, and if the bylaws of such board include no provision for arbitration, then arbitration shall be pursuant to the rules of the American Arbitration Association which rules are by this reference incorporated herein.
16. Agent agrees to indemnify Broker and hold Broker harmless from, as well as defend Broker against, all claims, demands and liabilities, including costs and attorney's fees, to which Broker is subjected by reason of any action taken by Agent or failed to be taken by Agent pursuant to this Agreement.
17. It is contemplated by both parties to this Agreement that Agent will use a motor vehicle for the purpose of transporting clients or other persons as part of Agent's efforts to solicit and obtain listings and sales, rentals or leases of property, Agent agrees as part of Agent's commitment to serving the public as a licensed real estate agent to maintain motor vehicle liability insurance with the following minimum coverage's: \$100,000/\$300,000/\$5,000 bodily injury/property damage (or a combined single limit of \$300,000). Broker shall be named as an additional insured under Agent's insurance coverages. Agent shall provide proof that such coverages are in force at the time of execution of this Agreement and shall provide such proof at any subsequent time at Broker's request.
18. Agent shall not, after the termination of this Agreement, use to Agent's own advantage, or to the advantage of any other person or corporation, any information or materials gained for or from the files or business of Broker.
19. The following provisions are also integral parts of this Agreement
 - (a) This Agreement shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, heirs and legatees of the respective parties hereto, and any entities resulting from the reorganization, consolidation or merger of any party hereto.
 - (b) This Agreement constitutes the entire understanding and agreement between the parties and supersedes all prior agreements, representations or understandings between the parties relating to the subject matter hereof. All prior agreements relating to the subject matter hereof, whether written or oral, are hereby merged into this Agreement.

- (d) The provisions of this Agreement are severable, and should any provision hereof be void, voidable or unenforceable, such void, voidable or unenforceable provision shall not affect any other portion or provision of this Agreement.
- (e) Any waiver by either party hereto of any breach of any kind or character whatsoever by the other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of or consent to any subsequent breach of this Agreement on the part of the other party.
- (f) This Agreement may not be modified except by an instrument in writing signed by the parties hereto.
- (g) This Agreement shall be interpreted, construed and enforced according to the laws of the State of Utah.
- (h) In the event any action or proceeding is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover attorneys' fees in such amount as the court may adjudge reasonable.

0. Agent stipulates that Agent has had the opportunity to review with Broker the policies and procedures of Broker and understands the same.

WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first set forth above.

BROKER:

PRIME COMMERCIAL, INC.

[Signature]
President 1/1/94

AGENT

[Signature]

ACKNOWLEDGMENT OF RECEIPT

hereby acknowledge receipt of a copy of the foregoing Agreement together with Exhibit A hereto.

3/14/94
Date

[Signature]
Agent

COMMISSION SCHEDULE

Conditions Governing Payment of Commissions to Agent:

1. Broker will only pay commissions on cash income.
2. If Broker's share of a commission or any part thereof is deferred or if a note is taken, Broker will not be required to pay any commission to Agent until cash income is received.
3. If a note is taken by Broker for commissions owed and interest is earned on that note, then Agent shall receive a share of the interest proceeds in the same proportions as the commission splits set forth in Exhibit A.
4. The commission schedule shall be based on Exhibit A as attached hereto. Said schedule shall remain in effect, unless agreed upon by both parties in writing.



PARTNER ASSOCIATE

| | | | | | |
|-------|-------------|--------------|--------------|-------------|--------|
| 10-50 | \$0.00 | \$55,000.00 | \$27,500.00 | \$27,500.00 | |
| 10-40 | \$55,000.00 | \$90,000.00 | \$21,000.00 | \$14,000.00 | |
| 10-30 | \$90,000.00 | \$250,000.00 | \$112,000.00 | \$48,000.00 | |
| TOTAL | | | \$160,500.00 | \$89,500.00 | 64.20% |



Tab 5

DENNIS K. POOLE (2625)
ANDREA NUFFER (6623)
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107
Telephone: (801) 263-3344
Fax: (801) 263-1010

FILED
9:07:10 PM 2:45

Bally Hoch

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

BRENT D. MITCHELL, :

Plaintiff, :

vs. :

PRIME COMMERCIAL, INC., a :
Corporation, and SALT LAKE :
BOARD OF REALTORS, A Corpor- :
ation, :

Defendants. :

COMPLAINT

CIVIL NO.

JUDGE

9509106465 CV
~~JUDGE ANNE M. STIRBA~~

PLAINTIFF BRENT D. MITCHELL, by and through his attorneys,
complains of Defendants and for causes of action alleges as
follows:

1. Plaintiff Brent D. Mitchell ("Mitchell") is an individual
residing in Salt Lake County, State of Utah.

2. Defendant Prime Commercial, Inc. ("Prime") is a Utah
corporation whose principal place of business is located in Salt
Lake County, Utah.

3. Defendant Salt Lake Board of Realtors is a Utah corpora-
tion whose principal offices are located in Salt Lake County, Utah.

FIRST CLAIM FOR RELIEF
(Breach of Contract - Prime)

4. On or about the 1st of January, 1994, Plaintiff entered into an agency Agreement with Defendant Prime whereby Plaintiff agreed to act as an agent for Prime and Defendant Prime agreed to pay commissions to Plaintiff for property listed and/or sold by Plaintiff on behalf of Defendant Prime. A copy of the Agreement is attached hereto as Exhibit "A".

5. Plaintiff terminated his relationship as an agent with Prime on or about the 31st of August, 1994.

6. Pursuant to Paragraph 13 of the Agreement and as a result of Plaintiff's efforts, Prime owes Plaintiff outstanding commissions in a sum not less than \$20,544.69.

7. Despite Plaintiff's numerous requests, Defendant Prime has failed and refused to pay the commissions due and owing to Plaintiff.

8. Interest upon the unpaid commissions is accruing at the legal rate of ten percent (10%) per annum.

WHEREFORE, Plaintiff prays for relief as more particularly set forth below.

SECOND CLAIM FOR RELIEF
(Declaratory Relief - Board)

9. Plaintiff realleges the allegations contained in Paragraphs 1 through 8 as if fully set forth hereat.

10. Pursuant to Paragraph 15 of the Agreement, Plaintiff and Prime were obligated to submit the subject dispute regarding

commissions owing to Plaintiff to the Salt Lake Board of Realtors ("Board") for arbitration (Exhibit "A").

11. On or about the 5th of January, 1995, Plaintiff submitted its Demand for Arbitration to the American Arbitration Association.

12. A hearing was originally scheduled by the Board for April 5, 1995. This hearing was continued by the Board until April 24, 1995.

13. Shortly thereafter, the April 24, 1995 hearing was indefinitely continued by the Board.

14. The Board has failed and refused to reschedule a hearing regarding the subject dispute between Plaintiff and Prime despite Plaintiff's numerous requests that an arbitration hearing be scheduled.

WHEREFORE, Plaintiff prays for relief as more fully set forth below.

THIRD CLAIM FOR RELIEF
(Attorney's Fees and Costs)

15. Plaintiff realleges the allegations contained in Paragraphs 1 through 14 as if fully set forth hereat.

16. Paragraph 19(h) of the Agreement states: "In the event any action or proceeding is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover attorneys' fees in such amount as the court may adjudge reasonable" (Exhibit "A").

17. Pursuant to Paragraph 19(h) of the Agreement, Plaintiff is entitled to his reasonable costs and attorney's fees incurred in bringing this action and in pursuing the arbitration claims.

WHEREFORE, Plaintiff prays for relief as follows:

PRAYER FOR RELIEF

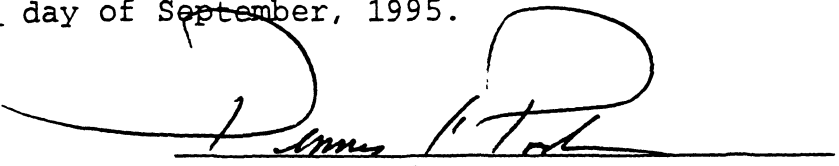
1. On Plaintiff's First Claim for Relief, for damages in the amount of \$20,544.69 plus interest at the legal rate of ten percent (10%) per annum;

2. On Plaintiff's Second Claim for Relief, for declaratory judgment declaring that the subject dispute need not be arbitrated for reason of the Board's failure to timely schedule a hearing on this matter or in the alternative a mandatory injunction requiring the Board to schedule a hearing between Plaintiff and Defendant.

3. On Plaintiff's Third Claim for Relief, for Plaintiff's costs and attorney's fees reasonably incurred in this matter;

4. For such other relief this Court deems just and equitable.

DATED this 13 day of September, 1995.



DENNIS K. POOLE
ANDREA NUFFER
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff

Plaintiff's address:
4085 South 1242 East
Salt Lake City, Utah 84124



THIS AGREEMENT, made this 1st day of January, 1994 by and between PRIME COMMERCIAL, INC. ("Broker"), and Brent D. Mitchell ("Agent") an individual authorized to act as a licensed real estate agent in the State of Utah.

WITNESSETH:

WHEREAS, Broker is qualified to and does engage in business as a licensed general real estate broker in the State of Utah; and

WHEREAS, Group maintains an office in the State of Utah, properly equipped with furnishings and other equipment necessary and incidental to the proper operation of said business, and staffed suitably to serve the public as a real estate broker; and

WHEREAS, Agent is now engaged in business as a licensed real estate agent; and

WHEREAS, the parties consider it to be to their mutual advantage to form the association hereinafter agreed to.

NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, the parties hereto agree as follows:

1. Broker agrees to make available to Agent, at Agent's request, all current listings in the Broker's office. In addition, at Agent's discretion and at Agent's request, Broker may, from time to time, supply Agent with prospective listings. Nothing herein stated shall be construed to require Agent to accept or service any particular listing or prospective listing offered by Broker; nor shall Broker have any right or authority to direct that Agent see or service particular parties, or to restrict Agent's activities to particular areas. Broker shall have no right, except to the extent required by law, to direct or limit Agent's activities as to hours, leads, open houses, opportunity or floor time, prospects, sales, sales meetings, schedule, services, inventory, time off, training, vacations, or similar activities.
2. At Agent's request and in Agent's sole discretion, Broker agrees to furnish such advice, information and full cooperation as Agent shall decide. Broker agrees that by furnishing any such advice, information or cooperation, Broker obtains no authority or right to direct or control Agent's actions except as specifically required by law and that Agent assumes and retains discretion for methods, techniques and procedures used in soliciting and obtaining listings and sales, leases, or representation agreements.

3. Broker agrees that Agent may share with other agents all the facilities of the office now operated by Broker in connection with the subject matter of this Agreement, which office is now maintained at 4505 South Wasatch Blvd., Suite 120, Salt Lake City, Utah 84124.
4. Until termination of this Agreement, Agent agrees to work diligently and use Agent's best efforts to sell, lease or rent any and all real estate listed with Broker, to solicit additional listings and customers for Broker and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this Agreement may derive the greatest profit possible, provided that nothing in this Agreement shall be construed to require Agent to handle or solicit particular listings or authorize Broker to direct or require that Agent do so. Agent agrees to perform no other activities in association with Broker, except to solicit and obtain listings and sales, leases, representation agreements or management contract of property, for the parties' mutual benefit, and to do so in accordance with law and the ethical and professional standards as required in Paragraph 5 of this Agreement.
5. Agent agrees to commit no act of a type for which the Securities Commission or the Board of Real Estate Examiners of the State of Utah is authorized to suspend or revoke the license of either Agent or Broker. Broker and Agent agree to conform to and abide by all laws, rules and regulations, and codes of ethics that are binding upon or applicable to real estate brokers or agents.
6. Broker's typical and customary commissions from time to time in effect, shall be charged to the parties for whom services are performed, except that Broker may agree in writing to other rates with such parties. Broker will advise all agents associated with Broker of any special commission rates made with respect to the listings as provided in this paragraph. When Agent shall perform any services under this Agreement for which a commission is earned, the commission shall, when collected, be divided between Broker and Agent as set forth in the Commission Schedule attached hereto as Exhibit A and incorporated herein by reference, unless Broker and Agent agree in writing upon a different method of dividing the commission before completion of any particular transaction. In the event that two or more agents participate in any service which is subject to this Agreement, or claim to have done so, the amount of the commission over that accruing to Broker shall be divided between the participating agents according to agreement between them or by arbitration. In no case shall Broker be personally liable to Agent for Agent's share of any commission not collected, nor shall Agent be personally liable to Broker for any commissions not collected. In compliance with the laws of the State of Utah, all commissions will be received by Broker. When any commission shall have been collected from the party or parties for whom the service was performed, Broker shall hold the same in trust for Agent and Broker to be divided between them according to the terms of this Agreement. Agents shall not have the right to negotiate commissions with current or prospective clients without first discussing same with Broker and obtaining permission from Broker.
7. The division and distribution of the earned commissions pursuant to Paragraph 6 of this Agreement shall take place as soon as feasible after collection of such commissions from the party or parties for whom the services may have been performed. Any suit for the collection of commissions from clients shall be maintained only in the name of Broker. Agent shall not be entitled to any advance or payment from Broker upon future commissions or commissions earned but uncollected. Agent's only remuneration shall be Agent's share of the commissions paid by the party or parties for whom services were performed. Any advances paid to agents must be approved by Broker and must be documented by a note.

8. Broker shall not be liable to Agent for any expenses incurred by Agent, or for any of Agent's acts except as specifically required by law, nor shall Agent be liable to Broker for office help or expense. Agent shall have no authority to bind Broker by any promise or representation unless specifically authorized in writing in a particular transaction. Expenses that must, by reason of some necessity, be paid from the commission, or are incurred in the collection of, or the attempt to collect, the commission, shall be paid by the parties in the same proportion as the commission, divided pursuant to the terms of this Agreement.
9. Agent agrees to provide and pay for all Agent's necessary professional licenses and dues; Broker shall not be liable to reimburse Agent therefor. In the event that Broker elects to advance sums to Agent for the payment of Agent's professional licenses, dues or other items, Agent agrees to repay such advances to Broker upon demand and Broker may deduct such advances from commissions otherwise payable to Agent.
10. This Agreement does not constitute a hiring by either party. It is the parties' intention that, so far as shall be in conformity with law, Agent shall be an independent contractor and not Broker's employee, and in conformity therewith, that Agent retain sole and absolute discretion and judgment in the manner and means of carrying out Agent's selling and soliciting activities. Therefore, the parties hereto are and shall remain independent contractors bound by the provisions of this Agreement. Agent is under the control of Broker as to the result of Agent's work only and not as to the means by which such is accomplished. This Agreement shall not be construed as a partnership and Broker shall not be liable for any obligation incurred by Agent.
11. In accordance with law, Agent agrees that any and all listings of property, and all employment in connection with the real estate business shall be taken in the name of Broker. Listings shall be filed with Broker within twenty four (24) hours after receipt of any such listing by Agent. In consideration for the commission payable to Agent pursuant to the terms of this Agreement, Agent agrees to and does hereby contribute all right and title to any and all listings solicited and obtained by Agent to Broker for the benefit and use of Broker, Agent and all other agents associated with Broker to whom Broker may give the listing; provided, however, that Agent shall have the rights provided in Paragraph 12 of this Agreement with respect to listings procured by Agent prior to termination.
12. On completion of any work-in-process, this Agreement may be terminated, with or without cause, by Broker or Agent at any time. Broker may terminate this Agreement on the occurrence of any of the following causes:
 - (a) An election of Broker to sell its entire business or to cease doing business;
 - (b) Any breach of this Agreement by Agent;
 - (c) Suspension, revocation, or other termination of Agent's license;
 - (d) Failure of Agent to comply with any applicable law or regulation of either the Securities Commission or the Board of Real Estate Examiners;
 - (e) Conviction of Agent of any crime other than minor traffic offenses.
13. Upon termination of this Agreement, Agent's regular proportionate share of the commissions on any sales Agent has made that are not closed shall, upon the closing of such sales, be paid to Agent, if collected by Broker. Except in cases of termination

for cause, Agent shall also be entitled to receive the portion of the commissions, received by Broker after termination, allocable to the listing (but not the sale) as set forth in Broker's current commissions schedules, on any listings procured by Agent during Agent's association with Broker.

14. If, upon termination of this Agreement, Agent fails to complete work on any pending transactions that normally would be rendered by Agent, Broker shall make arrangements with another agent in Broker's organization to perform such work and shall be compensated for completing the details of pending transactions and such compensation shall be deducted from Agent's share of the commission.
15. In the event of disagreement or dispute between Agent and any other agent associated with Broker, or between Broker and Agent arising out of or connected with this Agreement which cannot be adjusted by and between the parties involved, the dispute or disagreement shall be submitted to the Real Estate Board of which Broker is a member for arbitration pursuant to the provisions of its bylaws, said provisions being hereby incorporated by reference, and if the bylaws of such board include no provision for arbitration, then arbitration shall be pursuant to the rules of the American Arbitration Association which rules are by this reference incorporated herein.
16. Agent agrees to indemnify Broker and hold Broker harmless from, as well as defend Broker against, all claims, demands and liabilities, including costs and attorney's fees, to which Broker is subjected by reason of any action taken by Agent or failed to be taken by Agent pursuant to this Agreement.
17. It is contemplated by both parties to this Agreement that Agent will use a motor vehicle for the purpose of transporting clients or other persons as part of Agent's efforts to solicit and obtain listings and sales, rentals or leases of property, Agent agrees as part of Agent's commitment to serving the public as a licensed real estate agent to maintain motor vehicle liability insurance with the following minimum coverage's: \$100,000/\$300,000/\$5,000 bodily injury/property damage (or a combined single limit of \$300,000). Broker shall be named as an additional insured under Agent's insurance coverages. Agent shall provide proof that such coverages are in force at the time of execution of this Agreement and shall provide such proof at any subsequent time at Broker's request.
18. Agent shall not, after the termination of this Agreement, use to Agent's own advantage, or to the advantage of any other person or corporation, any information or materials gained for or from the files or business of Broker.
19. The following provisions are also integral parts of this Agreement:
 - (a) This Agreement shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, heirs and legatees of the respective parties hereto, and any entities resulting from the reorganization, consolidation or merger of any party hereto.
 - (b) This Agreement constitutes the entire understanding and agreement between the parties and supersedes all prior agreements, representations or understandings between the parties relating to the subject matter hereof. All prior agreements relating to the subject matter hereof, whether written or oral, are hereby merged into this Agreement.

- (d) The provisions of this Agreement are severable, and should any provision hereof be void, voidable or unenforceable, such void, voidable or unenforceable provision shall not affect any other portion or provision of this Agreement.
- (e) Any waiver by either party hereto of any breach of any kind or character whatsoever by the other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of or consent to any subsequent breach of this Agreement on the part of the other party.
- (f) This Agreement may not be modified except by an instrument in writing signed by the parties hereto.
- (g) This Agreement shall be interpreted, construed and enforced according to the laws of the State of Utah.
- (h) In the event any action or proceeding is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover attorneys' fees in such amount as the court may adjudge reasonable.

20. Agent stipulates that Agent has had the opportunity to review with Broker the policies and procedures of Broker and understands the same.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first set forth above.

BROKER:

PRIME COMMERCIAL, INC.

By: 

Its:  1/1/94

AGENT



ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of the foregoing Agreement together with Exhibit A thereto.

3/14/94
Date


Agent

COMMISSION SCHEDULE

Conditions Governing Payment of Commissions to Agent:

1. Broker will only pay commissions on cash income.
2. If Broker's share of a commission or any part thereof is deferred or if a note is taken, Broker will not be required to pay any commission to Agent until cash income is received.
3. If a note is taken by Broker for commissions owed and interest is earned on that note, then Agent shall receive a share of the interest proceeds in the same proportions as the commission splits set forth in Exhibit A.
4. The commission schedule shall be based on Exhibit A as attached hereto. Said schedule shall remain in effect, unless agreed upon by both parties in writing.



PARTNER ASSOCIATE

| | | | | | |
|-------|-------------|--------------|--------------|-------------|--------|
| 50-50 | \$0.00 | \$55,000.00 | \$27,500.00 | \$27,500.00 | |
| 60-40 | \$55,000.00 | \$90,000.00 | \$21,000.00 | \$14,000.00 | |
| 70-30 | \$90,000.00 | \$250,000.00 | \$112,000.00 | \$48,000.00 | |
| TOTAL | | | \$160,500.00 | \$89,500.00 | 64.20% |



Tab 6

FILED
DISTRICT COURT
95 OCT 12 PM 4:11

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY *Deputy Clerk*
DEPUTY CLERK

890
Douglas E. Grant (4328)
Randall E. Grant (1235)
GRANT & GRANT
Attorneys for Defendant
Prime Commercial, Inc.
349 South 200 East, #410
Salt Lake City, UT 84111
Telephone: (801) 364-7777

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

-----oo0oo-----

BRENT D. MITCHELL, :
 :
Plaintiff, : ANSWER AND COUNTERCLAIM
 : OF DEFENDANT PRIME COMMERCIAL,
vs. : INC.
 :
PRIME COMMERCIAL, INC., a :
Corporation, and SALT LAKE :
BOARD OF REALTORS, a : Civil No. 950906465CV
Corporation, :
 :
Defendants. : JUDGE ANNE M. STIRBA

-----oo0oo-----

Defendant, PRIME COMMERCIAL, INC., answers plaintiff's
Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against the defendant
upon which relief can be granted.

SECOND DEFENSE

Responding to the specific paragraphs of plaintiff's
Complaint the defendant answers as follows:

1. Admits the allegations contained in Paragraph 1.
2. Admits the allegations contained in Paragraph 2.
3. Admits the allegations contained in Paragraph 3.

4. Admits the allegations contained in Paragraph 4.

5. Admits the allegations contained in Paragraph 5.

6. Denies the allegations contained in Paragraph 6.

7. Denies the allegations contained in Paragraph 7.

8. Denies the allegations contained in Paragraph 8.

9. In response to paragraph 9, Prime Commercial, Inc.

realleges and incorporates by reference its answer to paragraph 1 through 8.

10. Admits that Prime Commercial, Inc. and Plaintiff agreed to arbitration pursuant to Paragraph 15 of the Agreement but denies each and every other allegation contained in Paragraph 10.

11. Prime Commercial, Inc. denies the allegations contained in paragraph 11 of plaintiff's Complaint for lack of information sufficient to form a belief as to the truth or falsity of the same.

12. Based on information and belief, Prime Commercial, Inc. admits the allegations contained in paragraph 12.

13. Prime Commercial, Inc. denies the allegations contained in paragraph 13 of plaintiff's Complaint for lack of information sufficient to form a belief as to the truth or falsity of the same.

14. Prime Commercial, Inc. denies the allegations contained in paragraph 14 of plaintiff's Complaint for lack of information sufficient to form a belief as to the truth or falsity of the same.

15. In response to paragraph 15, Prime Commercial, Inc.

realleges and incorporates by reference its answer to paragraph 1 through 14.

16. Admits the allegations contained in Paragraph 16.

17. Denies the allegations contained in Paragraph 17.

THIRD DEFENSE (Affirmative)

The defendant affirmatively alleges that the plaintiff's claims are barred by the equitable doctrines of estoppel, waiver and laches.

FOURTH DEFENSE (Affirmative)

The defendant affirmatively alleges that the plaintiff failed to perform all of plaintiff's obligations under the contract.

FIFTH DEFENSE (Affirmative)

The defendant affirmatively alleges that the plaintiff has failed to mitigate its damages.

SIXTH DEFENSE (Affirmative)

The defendant affirmatively alleges that the plaintiff has failed to perform certain conditions precedent and that plaintiff's claims are barred.

SEVENTH DEFENSE (Affirmative)

The defendant affirmatively alleges that the claims of the plaintiff are barred by the negligence of the plaintiff.

EIGHTH DEFENSE (Affirmative)

The defendant affirmatively alleges that the claims of the plaintiff are barred by the fraud and misrepresentation of the plaintiff.

NINTH DEFENSE (Affirmative)

For a separate and partial defense to plaintiff's complaint, defendant affirmatively alleges that plaintiff owes Prime Commercial, Inc. for commissions he received after leaving Prime Commercial for which Prime Commercial, Inc. is entitled to and that defendant is entitled to full credit and offset against any amount allegedly owed to or claimed by plaintiff. This is more fully set forth in the Counterclaim which follows.

WHEREFORE, the defendant prays that plaintiff's complaint be dismissed, with prejudice, that plaintiff take nothing thereby, and that the defendant be awarded his costs, attorney's fees and such other further relief as the Court deems appropriate, including the relief sought by the defendant in its Counterclaim which follows:

C O U N T E R C L A I M

Defendant, PRIME COMMERCIAL, INC., hereby counterclaims against the plaintiff, BRENT D. MITCHELL, and alleges as follows:

1. That plaintiff, BRENT D. MITCHELL "Mitchell", is an individual residing in Salt Lake County, State of Utah.
2. That counterclaimant, PRIME COMMERCIAL, INC., is a Utah Corporation with its principal place of business in Salt lake County, Utah.
3. The events and transactions described in this counterclaim took place and were to be performed in Salt Lake County, State of Utah.

4. On or about the 1st of January, 1994, Mitchell entered into an Agreement with Prime Commercial, Inc. A copy of the Agreement is attached to Plaintiff's complaint as Exhibit "A".

5. As per paragraphs 7, 11 and 18 of the agreement, Mitchell was contractually bound to use Prime Commercial, Inc.'s resources for Prime Commercial Inc.'s benefit.

6. Upon information and belief, Mitchell has received commission payments (in the form of a partnership buy-out) in the amount of \$15,000.00 of which Prime Commercial, Inc. is entitled to its commission split of \$7,500.00.

7. Upon information and belief, after Mitchell's termination he received other commission payments which were obtained because of information and/or materials gained from the files or business of Prime Commercial Inc. The amount of damages are as yet not determined and should be determined by the Court at trial based upon the evidence.

8. The counterclaimant has had to hire an attorney to prosecute this action and should be awarded reasonable attorney's fees, and costs of suit and interest at the lawful rate.

WHEREFORE, the counterclaimant prays for judgment against the plaintiff as follows:

1. For judgment against Mitchell in an amount to be determined by the Court at trial based upon the evidence.

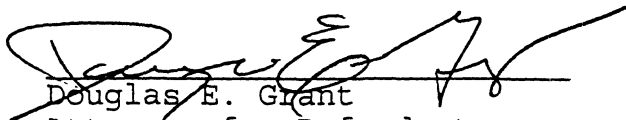
3. For reasonable attorney's fees and costs of suit.

4. For such other and further relief as the Court deems appropriate.

DATED this 12 day of October, 1995.

GRANT & GRANT

By

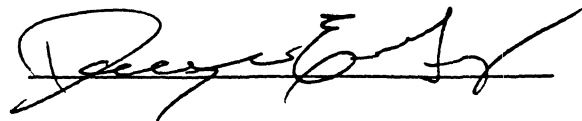

Douglas E. Grant
Attorney for Defendant
and Counterclaimant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of
the foregoing Answer and Counterclaim, this 13 day of
October, 1995, postage prepaid, to the following:

Dennis K. Poole
DENNIS K. POOLE & ASSOCIATES
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107

Ford G. Scalley
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111



Tab 7

FILED
DISTRICT COURT

91 APR 12 AM 8:18

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY
Bally Koch

DENNIS K. POOLE (2625)
ANDREA NUFFER (6623)
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Plaintiff
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107
Telephone: (801) 263-3344
Fax: (801) 263-1010

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

| | | |
|------------------------------|---|------------------------|
| BRENT D. MITCHELL, | : | |
| | : | AFFIDAVIT OF |
| Plaintiff, | : | BRENT D. MITCHELL |
| | : | |
| vs. | : | CIVIL NO. 950906465 CV |
| | : | |
| PRIME COMMERCIAL, INC., a | : | JUDGE ANNE M. STIRBA |
| Corporation, and SALT LAKE | : | |
| BOARD OF REALTORS, A Corpor- | : | |
| ation, | : | |
| Defendants. | : | |

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

BRENT D. MITCHELL, being first duly sworn upon oath, deposes and states as follows:

1. Apart from my employment as a real estate agent, I am also a member and manager of Red Point Equity, L.L.C. ("Red Point"), a limited liability company engaged in the business of real estate development.

2. I became a member of Red Point which was organized to pursue real estate development activities independent of any Agent-Broker relationship existing between me and Prime Commercial.

3. In 1994, Red Point entered into a joint venture agreement with Leonard K. M. Fong ("Fong") for the development of a planned unit development on property located on Atwood Boulevard in Murray, Utah.

4. With my assistance, and in furtherance of the joint venture agreement, Fong acquired the real property located on Atwood Boulevard from unrelated third parties resulting in the payment of real estate commissions to Prime Commercial.

5. As the developer of the project on Atwood and pursuant to the terms of the joint venture agreement between Red Point and Fong, Red Point was to retain a share of the profits from the venture. The profits Red Point was to retain were for Red Point's development activities, and not any activities associated with Paragraph 4 of the Agreement between me and Prime Commercial.

6. Fong and I agreed that once the planned unit development was completed I, as an agent of Prime Commercial, would market and sell the individual units pursuant to a listing agreement the joint venture would enter into with Prime Commercial.

7. Fong subsequently refused to finance construction of the planned unit development, thereby breaching the joint venture agreement between Fong and Red Point.

8. As a consequence of Fong's breach, Red Point commenced an action in Third District Court entitled Red Point Equities, L.C. v. Leonard K.M. Fong, Civil No. 950903430CN. With the filing of the Complaint against Fong, Red Point recorded a lis pendens in the offices of the Salt Lake County Recorder.

9. In an attempt to resolve the breach of the joint venture agreement and to settle the claims in the above-mentioned litigation, Fong purchased Red Point's interest in the joint venture for approximately \$15,000.00. The settlement amount paid was solely attributable to Red Point's interest in the joint venture. Neither Prime Commercial nor I had a listing agreement to sell any joint venture/partnership interest Red Point had in the joint venture with Fong. Consequently, no portion of the settlement was for any commissions on the sale of the finished or unfinished units.

10. At the time that Fong purchased Red Point's interest in the joint venture agreement, the joint venture had not entered into any listing agreements with Prime Commercial for the listing or sale of any of the finished units because no development or construction had commenced.

11. On or about the 30th of May, 1995, my attorney received a letter from counsel for Prime Commercial which listed five properties as known listings which I had procured for Prime Commercial prior to my leaving. A copy of this letter is attached hereto as Exhibit "A".

12. Of the above five properties listed on the May 30th letter from counsel for Prime Commercial, only three of them were listed with Prime Commercial at the time I left. The 6-Plex property had been previously sold for which Prime Commercial received a commission; and there was no current listing with Prime Commercial for that property at the time I terminated my association. (Exhibit "A"). Also, I never had a listing agreement with

either Prime Commercial or any other broker for the 1.8 acres in West Jordan.

13. I had no other listings at the time I left Prime Commercial.

14. I received no commissions from any of the three listings I had at the time I left Prime Commercial. Each of those listings expired before a buyer was located.

15. Of the three properties for which I had listing agreements with Prime Commercial at the time I left Prime Commercial, I have not listed any of those properties with any other broker, nor have I collected commissions from any sales of such properties.

FURTHER AFFIANT SAYETH NOT.

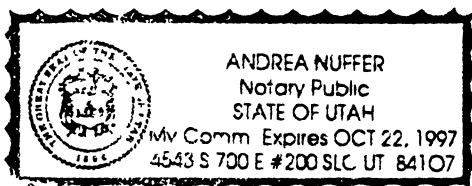
DATED this 17 day of April, 1996.

BRENT D. MITCHELL

ACKNOWLEDGED before me by BRENT D. MITCHELL this 17 day of April, 1996.

My Commission Expires:

Oct 22, 1997



NOTARY PUBLIC, residing at:

1610 Lake View


MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing
AFFIDAVIT OF BRENT D. MITCHELL in Civil No. 950903430 CN was
mailed, U.S. Mail, postage pre-paid to the following:

Douglas E. Grant, Esq.
Randall E. Grant, Esq.
GRANT & GRANT
349 South 200 East, Suite 410
Salt Lake City, Utah 84111

Thomas R. Karrenberg, Esq.
Nathan B. Wilcox, Esq.
ANDERSON & KARRENBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

this 17 day of April, 1996.



RANDALL E. GRANT
DOUGLAS E. GRANT

GRANT & GRANT
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
348 SOUTH 200 EAST, SUITE 410
SALT LAKE CITY, UTAH 84111-2811
TELEPHONE (801) 364-7777

FAX (801) 364-7778

May 25, 1995

Dennis K. Poole, Esq.
DENNIS K. POOLE & ASSOCIATES
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107

Re: Prime Commercial, Inc. and Brent Mitchell

Dear Mr. Poole:

Thank you for your letter of May 16, 1995 outlining the claims of Brent Mitchell against Prime Commercial, Inc. I met this morning with my client and reviewed each transaction listed in your letter. My client's accounting of said transactions is as follows:

| | <u>Escrow Date</u> | <u>Close Date</u> | <u>Total Commission</u> | <u>Agreed Upon Reductions</u> | <u>Gross Commission</u> |
|------------------------|--------------------|-------------------|-------------------------|-------------------------------|-------------------------|
| Gordon - Furstenau | 3/4/94 | 6/29/94 | \$28,083.00 | \$(7,020.75) | \$21,062.25 |
| Stewart - Farnsworth | 6/23/94 | 8/16/94 | \$ 6,500.00 | \$(847.50) | \$ 5,652.50 |
| Stewart - Brenkenridge | 8/29/94 | 9/13/94 | \$ 6,500.00 | \$(847.50) | \$ 5,625.50 |
| Fong - Kessimakis | 5/24/94 | 11/16/94 | \$16,800.00 | \$(5,600.00) | \$11,200.00 |
| Reynolds - Triple K | 5/25/94 | 5/8/95 | \$38,437.50 | \$(15,375.00) | \$23,062.50 |

My client has calculated the commission splits between Broker and Agent as follows:

| | <u>Close Date</u> | <u>Gross Commission</u> | <u>Comm. Split</u> | <u>Net Comm. Due Mitch.</u> | <u>Amount Paid</u> |
|----------------------------------|-------------------|-------------------------|--------------------|-----------------------------|----------------------|
| <u>1994:</u> | | | | | |
| | | | | | <u>Paid</u> |
| <u>Pre-Petition Commissions</u> | | | | | <u>Pre-petition</u> |
| Anderson - Boyce | 2/16/94 | \$ 7,200.00 | 50/50 | \$ 3,600.00 | \$ 3,600.00 |
| Reynolds - Black | 3/14/94 | \$ 6,000.00 | 50/50 | \$ 3,000.00 | \$ 3,000.00 |
| Jenkins - Pearson | 4/27/94 | \$ 2,994.00 | 50/50 | \$ 1,497.00 | \$ 1,497.00 |
| <u>Post-Petition Commissions</u> | | | | | <u>Paid/Offset</u> |
| | | | | | <u>Post-petition</u> |
| Gordon - Furstenau | 6/29/94 | \$21,062.25 | 50/50 | \$10,531.13 | \$10,531.13 |
| Stewart - Farnsworth | 8/16/94 | \$ 5,652.50 | 50/50 | \$ 2,826.25 | \$ 2,715.19 |
| Stewart - Brenkenridge | 9/13/94 | \$ 5,625.50 | 50/50 | \$ 2,826.25 | \$ -0- |
| Fong - Kessimakis | 11/16/94 | \$ 6,438.75 | 50/50 | \$ 3,219.38 | \$ -0- |
| " " " | 11/16/94 | \$ 4,761.25 | 60/40 | \$ 2,856.75 | \$ -0- |

Dennis K. Poole, Esq.

May 25, 1995

Page -2-

| | <u>Close Date</u> | <u>Gross Commission</u> | <u>Comm. Split</u> | <u>Net Comm. Due Mitch.</u> | <u>Amount Paid</u> |
|---------------------|-------------------|-------------------------|--------------------|-----------------------------|--------------------|
| <u>1995:</u> | | | | | |
| Reynolds - Triple K | 5/8/95 | \$23,062.50 | 50/50 | \$11,531.25 | \$ -0- |

The amount due Mitchell is summarized as follows:

| | |
|-----------------------------------|----------------------|
| Pre-petition Commissions Earned | \$ 8,097.00 |
| Pre-petition credit to Mitchell | \$ 1,687.73 |
| Pre-petition Payments to Mitchell | \$ (8,800.00) |
| Pre-petition advances to Mitchell | <u>\$ (6,224.72)</u> |

Amount due Prime Commercial from Mitchell as of 4/27/94 \$ (5,239.99)

Said amount is discharged through Bankruptcy filed on 4/28/94 \$ 5,239.99

| | |
|---|----------------------|
| Post-petition Commissions Earned | \$ 33,791.01 |
| Post-petition Payments to Mitchell (Checks and offsets) See Exhibit | <u>\$(13,246.32)</u> |

Commissions Due Mitchell \$ 20,544.69

There were several known listings your client had at the time he left Prime Commercial. We need to know if any of these listings closed with Mr. Mitchell's subsequent broker to determine if Prime Commercial is entitled to remuneration.

Those listed by Mr. Mitchell were as follows:

1. 6-Plex - 479 East 5600 South - \$250,000 - 6%
2. 2.5 acres at Alta - \$250,000 - 10%
3. Alta Pines - 4070 South 900 East - \$2,650,000 - 5%
4. Landing Point - 176 North Redwood Rd. \$3,500,000 - 3.5%
5. 2.2 acres - W. Jordan - \$180,000 - 6%

We also need to know if there were any other closings for listings entered into during the time your client was at Prime Commercial.

Inasmuch as the earnest money on Gordon - Furstenau was paid on 3/4/94 (pre-petition) and closed on 6/29/94 (post-petition) we need to have verified that said amount was disclosed as an account receivable in the bankruptcy proceeding and was abandoned by the Trustee. We will either pay the commission due to your client or the bankruptcy trustee.

Dennis K. Poule, Esq.

May 25, 1995

Page -3-

I have also received a copy of Red Point Equities Complaint against Leonard Fong. We have been informed by Mr. Fong's attorney that we will be named as a Third-Party Defendant to this action. Attached is a letter dated December 9, 1994 to Mr. Scott A. Hagen from Prime Commercial's previous counsel. Our position regarding Prime Commercial's interest in any profits made by Brent Mitchell and/or Red Point Equities, L.C. has not changed. However, as of this date we do not know what Prime Commercial's liabilities or profits might be.

We are prepared to pay any amount due your client upon receiving verification of the following

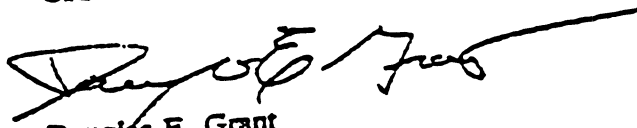
1. Verification that there were no other listings that closed after your client left Prime Commercial. For verification purposes we need to see a transactional accounting of Mr. Mitchell's closings from the time he left Prime Commercial similar to what we have provided you.
2. That the Gordon-Furstenau commission should not be paid to the bankruptcy trustee.
3. A full release of Prime Commercial from Mr. Leonard K.M. Fong.
4. Verification that Red Point Equities, L.C. and/or Mr. Brent Mitchell will not receive any further profits or commissions from Mr. Leonard K.M. Fong or anyone involved with the Atwood project or a statement indicating Prime Commercial's commission split for any further amounts received.

If we cannot reach a resolution to this matter we definitely want to proceed with arbitration. However, if Prime Commercial is indeed brought into the lawsuit your client filed against Leonard K.M. Fong as a Third-Party Defendant, arbitration is premature. Furthermore, as we discussed earlier, Mr. Urry is very concerned with Mr. Mitchell's slander towards himself and Prime Commercial which we need to be addressed in final settlement negotiations.

I look forward to hearing from you at your earliest convenience. If you have any questions please do not hesitate to contact me.

Very truly yours,

GRANT & GRANT, A.P.C.


Douglas E. Grant

DEG/mb

Encl.

cc: Mr. Steve Urry

MITCHEL

| DATE | DESCRIPTION | GR. COMM. | SPLIT | NET COMM. | CK. ISSD. | DEBIT | CREDIT | BALANCE |
|--------------|-----------------------------------|-------------------|-------|-------------------|-------------------|-------------------|-------------------|-------------------|
| 4/27/94 | COMM.JENKINS/PEARSON | \$2,994.00 | 50/50 | \$1,497.00 | \$1,000.00 | \$1,000.00 | \$1,497.00 | (\$5,239.81) |
| 4/28/94 | BANKRUPTCY FILING/DEBT DISCHARGED | | | | | | \$5,239.81 | \$0.00 |
| 5/10/94 | SKOOL LUNCH APR94 | | | | | \$9.67 | | (\$9.67) |
| 6/10/94 | SLBR DUES APR94 | | | | | \$37.00 | | (\$46.67) |
| 6/10/94 | HEALTH INS. 5/94 | | | | | \$62.50 | | (\$109.17) |
| 5/10/94 | AIRFARE PHOENIX/AM. WEST | | | | | \$248.00 | | (\$357.17) |
| 5/10/94 | NEWSPAPER AD 4/17 | | | | | \$47.60 | | (\$404.77) |
| 5/10/94 | DEALS EXPENSE REIMBURSED | | | | | | \$131.75 | (\$273.02) |
| 6/23/94 | CELLULAR BILL 5/14/94 | | | | | \$372.40 | | (\$645.42) |
| 6/1/94 | HEALTH INS. 6/94 | | | | | \$67.05 | | (\$712.47) |
| TOTAL | | \$2,994.00 | | \$1,497.00 | \$1,000.00 | \$1,844.22 | \$6,868.66 | (\$712.47) |
| DATE | DESCRIPTION | GR. COMM. | SPLIT | NET COMM. | CK. ISSD. | DEBIT | CREDIT | BALANCE |
| 6/1/94 | SKOOL LUNCH MAY94 | | | | | \$22.88 | | (\$735.13) |
| 6/13/94 | SLBR DUES MAY94 | | | | | \$37.00 | | (\$772.13) |
| 6/13/94 | CREDIT ON AMEX-TICKET | | | | | | \$129.00 | (\$643.13) |
| 6/13/94 | STAN ADAMS BILL | | | | | \$59.97 | | (\$703.10) |
| 6/13/94 | CHECK ISSUED | | | | \$2,000.00 | \$2,000.00 | | (\$2,703.10) |
| 6/21/94 | CELLULAR BILL 6/11/94 | | | | | \$368.42 | | (\$3,071.52) |
| 6/24/94 | CHECK ISSUED (LAURI HARMER) | | | | \$4,000.00 | \$4,000.00 | | (\$7,071.52) |
| 6/24/94 | CHECK ISSUED | | | | \$2,000.00 | \$2,000.00 | | (\$9,071.52) |
| 6/28/94 | CELLULAR BILL 6/24/94 | | | | | \$131.98 | | (\$9,203.48) |
| 6/29/94 | COMM.FURSTENAU/GORDON | \$21,062.25 | 50/50 | \$10,531.13 | \$0.00 | | \$10,531.13 | \$1,327.65 |
| 6/30/94 | PMT. TO STAN ADAMS | | | | | \$500.00 | | \$827.65 |
| 6/30/94 | E & O INS. DOWN PMT. | | | | | \$154.71 | | \$672.94 |
| 7/8/94 | NEWSPAPER AD 5/29/94 | | | | | \$45.80 | | \$627.04 |
| 7/8/94 | EYES SIGNS | | | | | \$282.19 | | \$334.85 |
| 7/8/94 | HEALTH INS. 7/94 | | | | | \$67.05 | | \$267.80 |
| 7/8/94 | SKOOL LUNCH 6/94 | | | | | \$14.85 | | \$252.95 |
| 7/12/94 | PROGRESSIVE INS. | | | | | \$112.02 | | \$140.83 |
| 7/12/94 | SLBR JUN94 | | | | | \$37.00 | | \$103.83 |
| 7/26/94 | CELLULAR BILL 7/23/94 | | | | | \$160.72 | | (\$56.89) |
| 8/2/94 | HEALTH INS. AUG94 | | | | | \$67.05 | | (\$123.94) |
| 8/3/94 | E & O INS. PMT. | | | | | \$61.09 | | (\$185.03) |
| 8/8/94 | SLBR JUL94 | | | | | \$37.00 | | (\$222.03) |
| 8/16/94 | CCMM.LARRY STEWART DUPE | \$5,652.60 | 50/50 | \$2,826.25 | \$1,783.75 | \$1,783.75 | \$2,826.25 | \$620.47 |
| 8/16/94 | DEAL EXPENSES REIMBURSED | | | | | | \$169.05 | \$989.52 |

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[illegible]